176 FERC ¶ 61,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Total Gas & Power North America, Inc. Docket No. IN12-17-000
Total, S.A.
Total Gas & Power, Ltd.
Aaron Hall
Theresa Tran f/k/a Nyugen

ORDER ESTABLISHING HEARING

(Issued July 15, 2021)

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1. This order establishes a hearing to determine whether Total Gas & Power North America, Inc. (TGPNA), Total, S.A. (Total), Total Gas & Power, Ltd. (TGPL), Aaron Hall (Hall), and Therese Tran f/k/a Nguyen (Tran) (collectively, Respondents) violated section 4A of the Natural Gas Act (NGA), 15 U.S.C. section 717c-1, and section 1c.1 of the Commission's regulations, 18 C.F.R. § 1c.1 (2020) (the Anti-Manipulation Rule), and to ascertain certain facts relevant for any application of the Commission's Penalty Guidelines.[1]

I. Background

A. Order to Show Cause and Staff Report

2. On April 28, 2016, the Commission issued an Order to Show Cause[2] directing TGPNA, Hall, and Tran to show cause why the Commission should not find that they manipulated the price of natural gas at four locations in the Southwest United States between June 2009 and June 2012 (Relevant Period), in violation of NGA section 4A[3] and the Anti-Manipulation Rule.[4] The Order to Show Cause further directed TGPNA's

[1] *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines).

[2] *Total Gas & Power N. Am., Inc.*, 155 FERC ¶ 61,105 (2016) (Order to Show Cause).

[3] NGA section 4A's Anti-Manipulation Provision prohibits market manipulation and provides, in pertinent part:

> It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

[4] The Anti-Manipulation Rule, 18 C.F.R. § 1c.1, makes it unlawful for:

> any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, (1) To use or employ any device, scheme, or artifice to defraud, (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances

ultimate parent, Total, and TGPNA's affiliate, TGPL, to show cause why they should not be held liable for TGPNA's, Hall's, and Tran's conduct. In the staff report accompanying the Order to Show Cause (Staff Report), staff of the Office of Enforcement (OE Staff[5]) allege that TGPNA, through Hall and Tran, engaged in a scheme in which it traded to affect monthly natural gas indexes by transacting at prices and in ways that were designed to move index prices in a direction that benefited its related derivative positions.[6] OE Staff further alleges that TGPNA, Hall, and Tran acted with scienter[7] when trading natural gas and that such trading was in connection with jurisdictional transactions.[8]

3. OE Staff commenced its investigation into TGPNA after the Commission's Enforcement Hotline received an e-mail on June 3, 2012, from a former TGPNA employee, Matthew Wilson (Wilson).[9] While at TGPNA, Wilson worked as an analyst and trader for natural gas.[10]

4. As a result of Wilson's Enforcement Hotline tip, and OE Staff's subsequent investigation, OE Staff allege that TGPNA engaged in the following trading scheme: Under the direction of Hall and Tran, TGPNA's West Desk[11] designed and implemented a scheme to affect monthly index prices at the Relevant Locations (defined in the Order to Show Cause as Southern California Gas Co. (SoCal); El Paso Natural Gas Co.,

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under which they were made, not misleading, or (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

[5] OE Staff and Respondents, collectively, are referred to as the Parties.

[6] Order to Show Cause, 155 FERC ¶ 61,105 at P 5.

[7] "[S]cienter requires knowing, intentional, or reckless misconduct, as opposed to mere negligence." *Barclays Bank PLC et al.*, 144 FERC ¶ 61,041, at P 62 (2013).

[8] Order to Show Cause, 155 FERC ¶ 61,105 at P 5, Staff Report at 72-77.

[9] Staff Report at 11, 18.

[10] *Id.* at 10-11.

[11] According to the Staff Report, TGPNA's trading was carried out by approximately 20 traders divided among seven desks. While organized mainly around geographic regions, each desk had authority to trade in every region. During the Relevant Period, the West Desk included Hall (West Desk director until September 2011), Tran (trader from 2007-2011; director from 2011-2013), Wilson (trader from 2009-2012), and Shaun Karimullah (trader starting in April 2012). *Id.* at 6.

Permian Basin (Permian); West Texas, Waha (Waha); and El Paso, San Juan Basin (San Juan) between June 2009 and June 2012). In the majority of months during this three-year Relevant Period, the West Desk set up its positions going into bidweek to benefit from and assist with its manipulation of index prices. Specifically, the West Desk arranged its prebidweek financial and physical index positions so that it had a large Print Risk[12] position, which included basis and index positions in opposite directions and a sizable physical index position. Then, when it decided that market conditions during bidweek were favorable for executing the scheme, the West Desk made fixed price trades to move the index in the same direction as its Print Risk position. This trading served to flatten its index positions while simultaneously benefitting its Print Risk positions. The scheme involved frequent and opportunistic trading of sufficient volumes of monthly physical fixed price gas, irrespective of supply and demand fundamentals and indifferent to price, in order to move index prices in directions that benefited related Print Risk positions whose value was derived from those published index prices.[13] OE Staff noted in its report that if this matter were set for hearing, it planned to submit expert testimony regarding the nature, scope, and harm caused by the scheme.[14]

5. The Order to Show Cause also directed TGPNA to show why it should not pay civil penalties under NGA section 22 in the amount of $213,600,000 and disgorge $9,180,000 in unjust profits, plus interest, resulting from market manipulation, or a modification to these amounts as warranted. The Order to Show Cause directed Hall to show why he should not pay NGA civil penalties of $1,000,000 (jointly and severally with TGPNA) and Tran to show why she should not pay NGA civil penalties of $2,000,000 (jointly and severally with TGPNA).

6. The Order to Show Cause further directed TGPNA's ultimate parent company, Total, and TGPNA's affiliate, TGPL, to show cause why they should not be held liable

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[12] TGPNA uses the term "Print Risk" to describe its net exposure to the published (i.e., printed) monthly index price at a given location. Three products often comprised TGPNA's Print Risk positions including financial basis swaps, financial index swaps, and physical index gas. For instance, TGPNA could build a long Print Risk position at a given location (i.e., a position that benefits from a higher monthly index price) by purchasing financial basis swaps, selling financial index swaps, and/or selling physical index gas. When purchasing financial basis swaps, the buyer pays the NYMEX index plus an adder and receives the monthly index. When selling financial index swaps, the seller pays the gas daily index and receives the monthly index. When selling physical gas at index, the seller receives the index price. *See id.* at 16-17.

[13] Order to Show Cause, 155 FERC ¶ 61,105 at P 5; *see also* Staff Report at 19.

[14] Staff Report at 3 n.8, 20 n.85, 98 n.452.

for TGPNA's, Hall's, and Tran's conduct and held jointly and severally liable for their disgorgement and civil penalties based on Total's and TGPL's significant control and authority over TGPNA's daily operations.[15]

B. Respondents' Answer

7. On July 12, 2016, Respondents filed an answer in opposition to the Order to Show Cause (Answer). In their Answer, Respondents requested that the Commission terminate the proceeding without a hearing.[16] As grounds for requesting that the Commission terminate the proceeding, Respondents assert three primary arguments, as described below.

8. First, they contend that the Staff Report and the substantive allegations contained therein "do not allege a cogent *prima facie* case" that Respondents violated NGA section 4A and the Anti-Manipulation Rule by (1) using a fraudulent device, scheme or artifice, (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or transportation of natural gas subject to the Commission's jurisdiction.[17] They argue, among other things, that OE Staff's allegations of market manipulation are based on non-credible testimony and a flawed analysis of the trading data, in which OE Staff failed to address TGPNA's assertions that it had legitimate economic motivations for its trades, and that OE Staff failed to present evidence of scienter.[18] Respondents further argue that "[t]he facts conclusively establish that TGPNA, Hall, and Tran did not engage in market manipulation" such that "there is no reasoned basis for the Commission to order financial disgorgements or the payment of civil penalties[.]"[19]

9. Second, Respondents contend that OE Staff has not presented facts that would justify asserting jurisdiction over Total and TGPL, each of which is a foreign corporation. They also contend that OE Staff has not justified holding Total and TGPL liable for TGPNA's, Hall's, and Tran's conduct, or holding TGPNA liable for Wilson's conduct.[20]

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[15] Order to Show Cause, 155 FERC ¶ 61,105 at P 2.

[16] Answer at 16-18, 184.

[17] *Id.* at 16.

[18] *Id.* at 24-77.

[19] *Id.* at 24.

[20] Respondents contend that even if Wilson's statements that he engaged in manipulative conduct at the direction of Tran can be believed, the Commission cannot impute Wilson's intent on TGPNA because such actions would have been outside the scope of his employment. *Id.* at 5-6, 65-72. OE Staff disagrees. *See* Enforcement Staff's

They also contend that OE Staff has not presented a *prima facie* case to hold Tran and Hall individually liable.

10. Third, Respondents contend that this proceeding should be terminated in whole or in part for various procedural reasons, including that most of the alleged violations are barred by the five-year statute of limitations set forth in 28 U.S.C. section 2462 (hereafter referred to as section 2462) and that the procedures the Commission uses to conduct the investigation and the subsequent penalty assessment proceedings violate due process in various ways.[21] Alternatively, Respondents argue that, should the Commission proceed with the assessment of a civil penalty, it is statutorily and Constitutionally required to do so in a civil action filed in federal district court, rather than in a hearing before a Commission Administrative Law Judge (ALJ).[22]

C. OE Staff's Reply

11. On September 23, 2016, OE Staff filed the Staff Reply to Respondents' Answer. OE Staff requests that the Commission refer this matter to an ALJ to determine the following factual disputes:

- Whether, through its trading and conduct, Respondents directly or indirectly: (1) used or employed any device, scheme, or artifice to defraud; (2) made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (3) engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.[23]
- Whether Respondents traded monthly physical fixed price natural gas with the intent to affect published monthly index prices, or acted recklessly to affect published monthly index prices.[24]

Reply to Respondents' Answer to Order to Show Cause and Notice of Proposed Penalties and Opposition to Respondents' Motion for Summary Disposition (Staff Reply) at 12-13, 63-65. *See also infra* PP 90-91.

[21] *See, e.g.*, Answer at 16-20, 131-34.

[22] *Id.* at 19-20, 144, 184.

[23] Staff Reply at 109-10.

[24] *Id.* at 110.

- Whether factors relevant to a civil penalty, including the factors set forth in the Penalty Guidelines, are present.[25]

OE Staff requests that the Commission reserve the determination of whether to impose civil penalties or other sanctions on Respondents until after the ALJ's Initial Decision.[26]

12. OE Staff also requests that the Commission determine that several facts are established in the record before referring the case to an ALJ.[27] OE Staff specifically asks the Commission to find as fact that:

- TGPNA executed monthly physical fixed price natural gas trades during bidweek at the Relevant Locations during the Relevant Period.
- Tran executed some of TGPNA's monthly physical fixed price natural gas trades at the Relevant Locations during the Relevant Period.
- Hall executed monthly physical fixed price natural gas trades on behalf of TGPNA in at least one point-month[28] during the Relevant Period, specifically, January 2011 at SoCal.
- The monthly physical fixed price natural gas trades TGPNA executed at the Relevant Locations during the Relevant Period affected the published monthly index prices for the Relevant Indexes.[29]
- TGPNA operates as an office within and under the control of Total and TGPL.[30]

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[25] *Id.*

[26] *Id.* at 110 n.400.

[27] *Id.* at 9-10.

[28] As noted in the Staff Report, the term "point-month" refers to both a time and a place, i.e., the combination of both (1) the relevant regional trading location (or point) and (2) the relevant monthly bidweek period. Thus, a single calendar month may give rise to multiple point-months where, for example, traders manipulated indexes at more than one trading location in a single monthly bidweek period. *See* Staff Report at 3 n.7.

[29] As used in the Staff Report, "Relevant Indexes" refers to the Relevant Locations' published monthly index prices. The official names of the Relevant Indexes are Southern Border, SoCal; El Paso, Permian Basin; Waha; and El Paso, San Juan Basin. *See id.* at 2 n.6.

[30] As noted *infra* at PP 248-49, we find it appropriate to leave these matters for hearing before the presiding ALJ.

OE Staff also asks the Commission to determine that TGPNA's monthly physical fixed price natural gas trades at the Relevant Locations during the Relevant Period were (a) in interstate commerce, (b) sales for resale, (c) not first sales, and (d) were "in connection with" third party jurisdictional transactions.[31]

13. Finally, OE Staff asks that the Commission reject Respondents' arguments for terminating or modifying this proceeding, referenced in section I.B. above.

D. Respondents' Motion for Leave to Respond to OE Staff's Reply

14. On January 17, 2017, Respondents moved for leave to file a response to the Staff Reply (Response). Rule 213(a)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(1) (2016) required Respondents to file an answer to the Order to Show Cause. The Order to Show Cause also allowed OE Staff to submit a reply. Respondents, however, filed a motion for leave to respond to the Staff Reply that included additional briefing on legal arguments. Rule 213(a)(2) prohibits an answer to an answer unless otherwise ordered by the decisional authority. In light of this rule, the Commission's past practice,[32] and Respondents' extensive briefing in their Answer to the Order to Show Cause, we are not persuaded to accept Respondents' additional legal briefing and will therefore deny their motion for leave to file additional briefing.

II. Overview of Commission's Rulings in this Order

15. In this order, we deny Respondents' motion to terminate this proceeding. As discussed in greater detail below, we find that OE Staff has presented sufficient facts to establish a *prima facie* case that TGPNA, Hall, and Tran violated NGA section 4A and the Anti-Manipulation Rule through a scheme to manipulate the price of natural gas at the Relevant Locations between June 2009 and June 2012. We also deny Respondents' contention that the evidence presented in support of the allegations does not present genuine issues of material fact and is therefore insufficient to allow this matter to go to a hearing. Accordingly, we establish a hearing to consider this issue, including the credibility of the witnesses and the validity of OE Staff's analysis of the trading data.

16. With regard to the issue of whether Total and TGPL may be held liable for TGPNA's conduct, we find that OE Staff has failed to establish any facts supporting a claim of general jurisdiction over Total and TGPL. However, we establish a hearing to create a record to determine whether specific jurisdiction can be exercised over Total and

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[31] Staff Reply at 10, 111.

[32] *See BP Am. Inc.*, 147 FERC ¶ 61,130, at P 11, *initial decision*, 152 FERC ¶ 63,016, *order on initial decision and reh'g*, 156 FERC ¶ 61,031, *order on reh'g*, 173 FERC ¶ 61,239 (2020).

TGPL in this matter, as alter egos of TGPNA, based on the facts established during the hearing that bear on the issue of alter ego liability. Similarly, we establish a hearing to create a record to determine whether Hall and Tran may be held individually liable for market manipulation in this proceeding on the ground that they personally engaged in acts in furtherance of the alleged scheme.

17. We reject Respondents' various procedural arguments, as discussed below. We find that the Order to Show Cause established a "proceeding" within the meaning of the statute of limitations in 28 U.S.C. section 2462. Together with the Parties' tolling agreements,[33] this satisfied the requirement that the Commission initiate a proceeding within five years of the conduct at issue. We also reject Respondents' various contentions that civil penalties for a violation of the NGA must be adjudicated in a federal district court, rather than at a hearing before a Commission ALJ. We reject Respondents' contention that NGA section 24 gives federal district courts exclusive jurisdiction to determine violations of the NGA. We also find that the appointment of the Commission's ALJs is consistent with the Appointments Clause of the United States Constitution. Finally, we reject Respondents' various other contentions concerning a lack of due process in the Commission's procedures for considering whether to impose civil penalties for violation of NGA section 4A.

III. Whether OE Staff Has Established a Sufficient *Prima Facie* Case and Whether There Are Genuine Issues of Material Fact to Justify Establishing a Hearing

18. Respondents seek dismissal of the Order to Show Cause, asking the Commission to "terminate this proceeding without a hearing."[34] In support of their request, Respondents argue that (1) "[t]he facts conclusively establish that TGPNA, Hall, and Tran did not engage in market manipulation" such that "there is no reasoned basis for the Commission" to find a violation;[35] and (2) the Staff Report "fails to establish the three elements of a violation of Section 4A of the Natural Gas Act" and is therefore "insufficient as a matter of law."[36]

19. The standard of review for requests for summary disposition is set forth in Rule 217 of the Commission's Rules of Practice and Procedure (Rule 217), which

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[33] *See infra* note 387.

[34] Answer at 2.

[35] *Id.* at 24.

[36] *Id.* at 115-124.

provides that the Commission may, in its discretion, "summarily dispose of all or part of a proceeding" if it determines that there is "no genuine issue of fact material to the decision."[37] We have found "Rule 217 [to be] analogous to summary judgment under Rule 56 of the Federal Rules of Civil Procedure[.]"[38] Accordingly, "the burden in summary disposition rests on the moving party," here, the Respondents, and "the evidence must be viewed in the light most favorable to the party opposing summary judgment,"[39] here, OE Staff. To demonstrate that there is "no genuine issue of material fact," Respondents must show that the "'record taken as a whole could not lead a rational [decision maker] of fact to find for the nonmoving party.'"[40] If the Commission declines to dismiss all or part of the Order to Show Cause, it may still "resolve factual issues on a written record" if those issues present no material disputes over fact, or may be adequately resolved on the written record.[41]

20. The NGA provides a trial-type hearing "when the written submissions do not provide an adequate basis for resolving disputes about material facts," or when motive, intent, or credibility are at issue or there is a dispute over a past event.[42] Thus, if a party demonstrates that "a witness' motive, intent, or credibility needs to be considered in addition to the documentary evidence," or if there is "a dispute over a past occurrence" requiring a trier of fact "to ascertain the credibility of the witness in order to decide which

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[37] 18 C.F.R. § 358.217 (2020).

[38] *San Diego Gas & Elec. Co. v. Sellers of Energy*, 114 FERC ¶ 61,070, at P 134 (2006).

[39] *Id.* (citing *Investigations of Certain Enron-related QFs*, 106 FERC ¶ 63,038 (2004). *See also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (discussing Fed. R. Civ. P. 56); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962) (same)).

[40] *San Diego Gas & Elec.*, 114 FERC ¶ 61,070 at P 134 (alterations in original) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

[41] *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997). *See also Woolen Mill Assocs. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990); *Minisink Residents for Envtl. Preservation and Safety v. FERC*, 762 F.3d 97 114-15 (D.C. Cir. 2014) (discussing the standards for reviewing the Commission's decision on whether to hold a hearing under the NGA).

[42] *Iroquois Gas Transmission Sys., L.P.,* 52 FERC ¶ 61,091, at 61,368 (1990).

account of the circumstances is credible,"[43] the Commission will issue an order establishing a hearing before an ALJ under Part 385.

21. For the reasons discussed below, we find that there are genuine issues of material fact to justify establishing a hearing before an ALJ. In addition, as discussed in greater detail below, we deny Respondents' argument that OE Staff has failed to present sufficient facts to establish a *prima facie* case that TGPNA, Hall, and Tran violated NGA section 4A and the Anti-Manipulation Rule.

A. The Sufficiency of OE Staff's Anti-Manipulation Claim under NGA Section 4A and the Anti-Manipulation Rule

22. Section 4A of the NGA provides:

> It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section [10b of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))] in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.[44]

23. The Commission adopted the Anti-Manipulation Rule pursuant to NGA section 4A through Order 670, which established the following elements of a violation of NGA Section 4A[45]: (1) use of a fraudulent device, scheme or artifice, (2) with the requisite scienter, (3) in connection with the purchase or sale of natural gas or transportation of natural gas subject to the Commission's jurisdiction.[46] Respondents

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[43] *Id.*

[44] 15 U.S.C. § 717c-1.

[45] The Anti-Manipulation Rule equally applies the prohibition on market manipulation arising from NGA section 4A's parallel provision in the Federal Power Act (FPA), which is found in section 222, 16 U.S.C. 824v. Accordingly, Commission and federal court precedent arising out of both natural gas contexts to which the NGA is applicable and electric contexts to which the FPA is applicable is relevant to the Commission's application of the Anti-Manipulation Rule.

[46] *Prohibition of Energy Mkt. Manipulation*, Order No. 670, 114 FERC ¶ 61,047, at P 49, *reh'g denied*, 114 FERC ¶ 61,300 (2006) (stating the elements of an anti-manipulation claim).

argue that the Staff Report fails to properly allege each of these elements and/or the evidence presented in support of the allegations is insufficient to allow this matter to go to a hearing.[47]

1. Fraudulent Device, Scheme, or Artifice

24. The Anti-Manipulation Rule defines fraud generally, "to include any action, transaction, or conspiracy for the purposes of impairing, obstructing or defeating a well-functioning market. Fraud is a question of fact that is to be determined by all the circumstances of a case."[48] Courts interpreting our Anti-Manipulation Rule have looked to case law interpreting section 10(b) of the Securities Exchange Act upon which NGA section 4A is modeled.[49] As courts have found, anti-fraud mandates "must be read flexibly, not technically and restrictively."[50] Further, deception need not be "a specific oral or written statement" because "[c]onduct itself can be deceptive."[51] Moreover, "[t]raders are presumed to be trading on the basis of their best estimates of a security's underlying economic value, . . . and to trade for other purposes can be deceptive."[52] This same logic has been applied in analyzing the conduct of traders in the context of energy markets.[53]

a. Respondents' Position

25. Respondents argue that when an alleged scheme "consists entirely of legitimate open-market transactions . . . conduct is only unlawful if the trader acted primarily with

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[47] Answer at 115-24.

[48] Order No. 670, 114 FERC ¶ 61,047 at P 50.

[49] *See FERC v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 234 (D.D.C. 2016) (*City Power Marketing*); *see also FERC v. Coaltrain Energy*, *L.P.*, No. 2:16-cv-00732-MHW-KAJ, 2018 WL 7892222, at *11 (S.D. Ohio, Mar. 30, 2018).

[50] *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (citing *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 151 (1972) (citation omitted)).

[51] *Stoneridge Inv. Partners*, *LLC v. Sci.-Atlanta*, 552 U.S. 148, 158 (2008).

[52] *City Power Mktg.*, 199 F. Supp. 3d. at 235 (citing *ATSI Commc'ns Inc. v. Shaar Fund*, *Ltd.*, 493 F.3d 87, 100-01 (2d. Cir. 2007)).

[53] *Id.* at 235-37.

manipulative intent,"[54] and that "[e]ven if there is evidence of manipulative intent, that intent must also be the *'but for'* cause of the transactions at issue."[55]

26. Respondents also assert that OE Staff cannot support a manipulation claim with the trade data because "[a]ll of the[] transactions [at issue] were bona fide purchases or sales in an open market by participants who operate at arms' length."[56] While Respondents recognize that OE Staff's allegation of fixed price trades at prices above or below the market is part of the manipulation scheme, Respondents argue that "Enforcement Staff . . . cannot . . . point to a single transaction where [they] can show that [Respondents] did not transact at market price"[57] nor "contend that any alleged deviation between TGPNA's trades and those of other market participants were the result of any deception on Respondents' part[.]"[58] Because "the vast majority of the fixed price trades at issue . . . were executed on [ICE],"[59] argue Respondents, these "transactions occurred between willing market participants at transparent prices."[60] Respondents thus argue that the alleged scheme "undisputedly . . . of bona fide open-market transactions"[61] cannot constitute the basis for a manipulation claim.

b. OE Staff's Position

27. OE Staff argues that Respondents' "but for" argument is precluded by the Commission's precedent, reciting the Commission's statement that "'[a] manipulative purpose, even if mixed with some non-manipulative purpose, satisfies the scienter

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[54] Answer at 116 (citing, *inter alia*, *Markowski v. SEC*, 274 F.3d 525, 528 (D.C. Cir. 2001)).

[55] *Id.* at 116 (citing *SEC v. Masri*, 523 F. Supp. 2d 361, 372 (S.D. N.Y. 2007)), 123-124.

[56] *Id.* at 117.

[57] *Id.*

[58] *Id.*

[59] ICE refers to the Intercontinental Exchange, Inc., which operates global financial and commodity markets.

[60] Answer at 118.

[61] *Id.*

requirement.'"[62] OE Staff also notes that, in multiple cases, the Commission has held that the Anti-Manipulation Rule covers open-market transactions executed with manipulative intent.[63] OE Staff further notes that, while Respondents have relied on one securities case for its "but for" argument, several other federal court cases have held that conduct can be manipulative based solely on intent, without application of a "but for" test.[64]

28. OE Staff also notes that, under Commission precedent, the fact that individual trades were "real" and made on an open market between willing participants does not mean that they were legitimate and does not preclude a finding that they were executed as part of a scheme to manipulate.[65]

c. Commission's Determination

29. The Commission finds that OE Staff has presented sufficient evidence to establish a *prima facie* case that Respondents engaged in a fraudulent scheme to manipulate the monthly index prices at the Relevant Locations in order to benefit their related derivative positions whose value was tied to those indices. If credited, that evidence indicates that Respondents devised and engaged in uneconomic trades of monthly physical fixed price natural gas during bidweek at the relevant trading locations and then reported those trades to publications for inclusion in monthly index prices.

30. Respondents' argument that their trades cannot constitute manipulation because they are open market transactions assumes that they did not act with manipulative intent. However, as we explain in the next section, for purposes of addressing Respondents' motion, OE Staff has provided sufficient evidence of scienter to defeat Respondents' request for summary disposition based on lack of intent; we therefore set this issue for hearing, as discussed in detail below. As the Commission has stated in other cases, open-market transactions of the nature alleged by OE Staff undertaken with manipulative intent can constitute manipulation, as such transactions can send inaccurate price signals to, or

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[62] Staff Reply at 42 (quoting *Barclays Bank*, 144 FERC ¶ 61,041 at P 70).

[63] *Id.* at 42-43 (citations omitted).

[64] *Id.* at 43 (citations omitted).

[65] *Id.* at 40 n.149 (quoting *Barclays Bank*, 144 FERC ¶ 61,041 at P 51; *BP Am.*, 156 FERC ¶ 61,031 at P 191).

otherwise impair, a well-functioning market, even in the absence of some other deceptive conduct.[66]

31. We are also not persuaded by Respondents' argument that manipulative intent must be a "but for" cause of an open market transaction to constitute manipulation. This position is in direct conflict with our past decisions in which we "reject[ed] the notion that, in addition to establishing a manipulative purpose, OE Staff must also disprove all possible non-manipulative purposes with which it may have been commingled."[67] "The Anti-Manipulation Rule requires manipulative intent; it does not require *exclusively* manipulative intent."[68] Respondents rely on a single case in the Southern District of New York to argue that "liability for an open market transaction is appropriate only where the defendant would not have conducted the transaction but for the manipulative intent."[69] We are not persuaded by the single distinguishable contrary case cited by Respondents.[70]

32. As we explain in the following section, a fact finder could conclude from the trade data and testimonial evidence that Respondents undertook these trades with manipulative intent. Thus, we conclude that the open-market transactions at issue in this case can be the basis for a manipulation claim, notwithstanding the legitimate trading strategies claimed by Respondents.[71]

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[66] *Vitol*, *Inc.*, 169 FERC ¶ 61,070, at P 125 (2019); *Barclays Bank*, 144 FERC ¶ 61,041 at PP 50-58 (citing, *inter alia*, *Brian Hunter*, 135 FERC ¶ 61,054, at P 51 n.78 (2011) (citing *In re. Amaranth Natural Gas*, 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008) (holding that "[A] legitimate transaction combined with an improper motive is commodities manipulation."))); *BP Am.*, 156 FERC ¶ 61,031 at P 191 ("We also agree with the ALJ that open market transactions executed with manipulative intent are sufficient to establish scienter."). The Commission's position comports with Rule 10b-5 securities precedent. *See Markowski v. SEC*, 274 F.3d at 529 ("'manipulation' can be illegal solely because of the actor's purpose").

[67] *Barclays Bank*, 144 FERC ¶ 61,041 at P 70.

[68] *Id.* (italics in original).

[69] *See* Answer at 118; *SEC v. Masri*, 523 F. Supp. 2d at 372.

[70] *See Barclays Bank PLC,* 144 FERC ¶ 61,041 at P 69 ("'[S]ole intent' is not the applicable legal standard.' Rather, under the Commission's Anti-Manipulation Rule, the Commission will make a holistic determination based on 'the overall facts and circumstances.'") (citations omitted).

[71] We are also unpersuaded by Respondents' argument that we must resolve all

2. Scienter

33. To establish a violation of our Anti-Manipulation Rule, "scienter requires knowing, intentional, or reckless misconduct, as opposed to mere negligence."[72] Courts interpreting the Anti-Manipulation Rule and the Federal Power Act (FPA) have looked to case law in securities fraud cases,[73] and the same logic applies to interpreting the NGA section 4A and our Anti-Manipulation Rule. These cases have held that the scienter inquiry relates to whether Respondents "intended to take certain actions and knew the consequences of such actions," not that they "intended to break the law."[74] "Knowledge means awareness of the underlying facts, not the labels that the law placed on those facts. . . . A knowledge of what one is doing and the consequences of those actions suffices."[75] OE Staff can show scienter through both direct and circumstantial evidence, and scienter is often proven through circumstantial evidence based on the totality of the evidence since "'[t]he presence of a fraudulent intent is rarely susceptible of direct proof[.]'"[76]

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questions of doubt in favor of Respondents when considering their motion to terminate the proceeding without a hearing. In making this argument, Respondents wrongly interpret a Third Circuit case from 1947 construing a tax statute. Answer at 123 (quoting *Hatfried*, *Inc. v. CIR*, 162 F.2d 628, 633 (3d Cir. 1947)). That case does not refer to questions of doubt in the facts, but in how the tax code and amendments should be interpreted. *See Hatfried*, 162 F.2d at 633 ("'[A]ll questions in doubt must be resolved in favor of those from whom the penalty is sought.'") (quoting Crawford, Statutory Construction, section 140, page 462).

[72] *Barclays Bank*, 144 FERC ¶ 61,041 at P 62; *see also* Order No. 670, 114 FERC ¶ 61,041.

[73] *Coaltrain Energy*, 2018 WL 7892222, at *11.

[74] *Coaltrain Energy*, 155 FERC ¶ 61,204, at P 242 n.662 (2016) (quoting *Pittsburgh Terminal Corp. v. Balt. & Ohio R.R. Co.*, 680 F.2d 933, 942 (3d Cir. 1982) ("A violation of section 10(b) does not require a specific intention to break the law. It requires only knowing or intentional actions which, objectively examined, amount to a violation.")).

[75] *Coaltrain Energy*, 2018 WL 7892222, at *21 (quoting *SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 77 (D.C. Cir. 1980)).

[76] *BP Amer.,* 152 FERC ¶ 63,016 at P 98 (quoting *Barclays Bank*, 144 FERC ¶ 61,041 at P 75).

a. Respondents' Position

34. Respondents assert that OE Staff fails to identify any credible evidence that Respondents acted with scienter.[77] According to Respondents, OE Staff has failed to provide documentary evidence of scienter, and the only direct evidence of scienter that OE Staff offers is Wilson's flawed testimony.[78] Respondents argue that Wilson admitted that he did not understand Respondents' trading strategy and that, to the extent he had intent to manipulate, his intent cannot be imputed to Respondents.[79] Respondents further argue that even if Wilson's intent could be imputed to them, it would only be for the two point-months "where he testified that he had manipulative intent[.]"[80]

35. Respondents also argue that OE Staff's allegation of a "'consistent pattern' of trading" is insufficient proof of scienter.[81] They assert that Respondents' trading patterns were part of a legitimate trading philosophy, and were not borne from any intent to manipulate markets.[82] Similarly, they argue that knowledge of how trading will affect the market is also insufficient to establish scienter, and as a result, the bidweek spreadsheets relied upon by OE Staff are immaterial.[83]

36. Finally, they argue that while OE Staff has alleged that Respondents have failed to "'offer any credible explanations for their trading conduct[,]'"[84] Respondents do not have to do so because their trades were legitimate and the burden is on OE Staff to show

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[77] Answer at 91-93, 119-22.

[78] *Id.* at 91-93, 119-20.

[79] *Id.* at 92, 119 ("'[G]uilt by association is impermissible.'") (quoting *SEC v. Lee*, 720 F. Supp. 2d 305, 321 (S.D. N.Y. 2010)).

[80] Answer at 93, 120.

[81] *Id*. at 91-92, 120-22.

[82] *Id.* at 92, 121 ("[L]egitimate trading 'must be willfully combined with *something more*' in order to qualify as market manipulation.") (quoting *ATSI Comm'ns* , 493 F.3d at 87-101).

[83] Answer at 121.

[84] *Id.* at 92 (quoting Staff Report at 69).

manipulative intent.[85] In any event, Respondents assert, they have credibly explained that their trading was part of a legitimate strategy to replicate physical basis trades.[86]

b. OE Staff's Position

37. OE Staff asserts that the absence of documentary evidence of scienter is immaterial for two reasons. First, OE Staff notes that Wilson's testimony provides direct evidence of Respondents' scienter.[87] Second, OE Staff cites to past orders in which the Commission acknowledged that because "'direct proof of scienter is rare, intent must often be based on legitimate inferences from circumstantial evidence[,]'"[88] and OE Staff argues that it described at length the circumstantial evidence—such as the West Desk's trading conduct and knowledge—from which manipulative intent can reasonably be inferred.[89]

38. In reply to Respondents' argument that a "consistent pattern" of trading is not enough to prove scienter, OE Staff asserts that Respondents have mischaracterized OE Staff's showing of intent, noting that "[i]t is not simply that they engaged in a 'consistent pattern' of trading; *it is the nature of their consistent trading conduct* that is the basis for inferring manipulative intent[.]"[90] That conduct is laid out in detail in the Staff Report.[91]

39. Finally, OE Staff notes that Respondents' assertion that manipulative intent cannot be inferred from their trading because their trading was legitimate is a circular argument,

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[85] *Id.* at 122.

[86] *Id*.

[87] Staff Reply at 25.

[88] *Id.* at 26 (quoting *BP Am.*, 156 FERC ¶ 61,031 at P 191).

[89] Staff Reply at 26.

[90] *Id.* at 40-41 (italics in original).

[91] *See id*. at 40-41. (OE Staff specifically cites: (a) the West Desk's large Print Risk positions; (b) the market share of fixed price bidweek trading consistently in the same direction as its Print Risk positions; (c) the bidweek trading tactics that consistently favored its Print Risk position; (d) the fixed price trading that did not reflect supply and demand fundamentals; (e) the trading with general indifference to price; (f) the real time tracking of the effect of their bidweek trades on the published index price and TGPNA's resultant profits and losses; (g) and the absence of a credible explanation for this trading conduct (citing Staff Report at 68-74)).

because the argument assumes that Respondents are correct on this point.[92] OE Staff emphasizes that whether Respondents' trading was legitimate or manipulative is a disputed issue of fact, and requests that the Commission reject Respondents' argument seeking summary disposition based on insufficient evidence of scienter.[93]

c. Commission's Determination

40. As we find below in section III.B.1 of this order, Wilson's credibility and the weight that should be accorded to his testimony is a disputed factual issue. In addition, whether Respondents' manipulative intent can be inferred from Wilson's testimony is also a disputed factual issue. For purposes of addressing the motion for summary disposition, when we view this evidence in the light most favorable to OE Staff,[94] we assume that Wilson's testimony is credible and that his testimony about what Respondents communicated to him is accurate. Respondents have not persuaded us that a reasonable factfinder could not infer scienter such that we should grant the motion.

41. Similarly, whether scienter can be inferred from Respondents' trading behavior and related evidence, such as the bidweek spreadsheets, is also a disputed factual issue. At best, Respondents have offered a competing interpretation of this trading data by arguing that their conduct amounts to legitimate trading. When we view the facts in the light most favorable to OE Staff, however, we conclude that scienter could be inferred from Respondents' trading conduct, which fits a pattern that we have found to be manipulative in other cases.[95]

42. Respondents are also incorrect on the burden that OE Staff must meet in proving scienter based on Respondents' trading. When the party with the burden of proof establishes a *prima facie* case, the burden of producing evidence to rebut or defeat the evidence supporting a claim falls upon the opposing party.[96] This does not require OE

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[92] Staff Reply at 39-40.

[93] *Id.* at 41.

[94] *See* discussion, *infra*, section III.B.

[95] *BP Am.*, 156 FERC ¶ 61,031 at P 191. *See also, e.g.*, *Barclays Bank*, 144 FERC ¶ 61,041 at P 75; *ETRACOM LLC*, 155 FERC ¶ 61,284, at P 149 (2016).

[96] *Lundell v. Anchor Constr. Specialists*, *Inc.*, 223 F.3d 1035, 1039-41 (9th Cir. 2000) (the party opposing a *prima facie* case "must come forward with sufficient evidence and 'show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves.'") (citation omitted); *BP Am.*, 156 FERC ¶ 61,031 at P 61.

Staff to irrefutably demonstrate manipulative intent in the Staff Report. Instead, once OE Staff establishes its *prima facie* case, Respondents have the burden of providing evidence to rebut or defeat OE Staff's evidence of scienter. Respondents' objections go to the weight of and the inferences that should be drawn from the evidence, which are questions of material fact more appropriate for resolution at a hearing. As such, we set this issue for hearing.

3. Connection to Jurisdictional Transactions

43. The Staff Report identified several sales by TGPNA of monthly physical fixed price and index gas made in furtherance of its scheme during the Relevant Period that were in interstate commerce, sales for resale, and not first sales.[97] The Staff Report also identified several forms of third party jurisdictional transactions that were priced off the manipulated Relevant Indexes and were thus "in connection with" TGPNA's fixed price jurisdictional trades.[98]

44. Respondents' Answer does not dispute OE Staff's assertions that TGPNA's monthly physical fixed price and index trades were subject to the Commission's jurisdiction, either directly or in connection with other third-party jurisdictional transactions.

45. We are persuaded that Respondents' trades fall within the jurisdiction of the NGA. Absent opposition from Respondents on this point, we conclude that these trades are in connection with the purchase or sale of natural gas or transportation of natural gas subject to the Commission's jurisdiction. Thus, we do not find the need to set this issue for hearing.

B. Respondents' Challenges Based on Witness Credibility and the Sufficiency of OE Staff's Trading Analysis

46. In seeking summary disposition of this matter, Respondents argue that OE Staff's allegations are based on non-credible testimony and on a flawed analysis of the trading data.[99] As set forth below, rather than showing that there are no genuine issues of material fact, as would be required for the Commission to dismiss OE Staff's charges or otherwise terminate the proceedings, Respondents' argument calls into question factual issues that must be resolved through an evidentiary hearing.

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[97] Staff Report at 75-76.

[98] *Id.* at 76-77.

[99] *See* Answer at 24-77.

1. Witness Credibility Issues

a. Respondents' Position

47. Respondents allege that "[t]he facts conclusively establish that TGPNA, Hall, and Tran did not engage in market manipulation[,]" arguing that "Enforcement Staff bases its allegations on the non-credible testimony of Matthew Wilson and [another former TGPNA employee,] Stephen Callender."[100] Respondents argue that whistleblowers Wilson and Callender cannot be believed, alleging that their testimonies materially contradict one another;[101] are inconsistent over time;[102] demonstrate manufactured or coached consistency;[103] are uncorroborated by the trade data;[104] reveal the witnesses' poor understanding of the underlying trading;[105] and are motivated by bias and financial incentives.[106] Respondents allege that OE Staff fails to "address and confront" these issues, and rather "denies that there is any issue at all."[107]

b. OE Staff's Position

48. OE Staff argues that Respondents' allegations concerning the witnesses' credibility "ignore the substance of Wilson's and Callender's testimony, lack merit and, at best, merely raise issues of fact regarding the witnesses' credibility that are most

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[100] *Id.* at 24. According to the Staff Report, Callender worked at TGPNA as a manager of natural gas storage and transportation between 2006 and 2011. Callender also engaged in some speculative trading in the Midwest. According to the Staff Report, Callender discovered the scheme through his review of company position reports and his interaction with other traders. On October 12, 2011, Callender reported his allegations to FERC and the CFTC. Callender filed a CFTC whistleblower complaint asserting allegations that mirror Wilson's allegation. Staff Report at 4, 12-13.

[101] Answer at 29-30.

[102] *Id.* at 37-40.

[103] *Id.* at 25-26, 37-38.

[104] *Id*. at 25-29.

[105] *Id.* at 65-72.

[106] *Id.* at 31-37, 41-43.

[107] *Id*. at 5.

appropriately resolved in a hearing."[108] OE Staff argues that Wilson's and Callender's testimonies are credible because they were independently obtained and are materially consistent with one another;[109] were consistent over time,[110] are corroborated by the trade data;[111] and demonstrate the witnesses' understanding of bidweek trading.[112] OE Staff rebuts allegations of bias by citing Wilson's positive performance reviews, and noting that Wilson called the Enforcement Hotline to report his colleague's trading scheme before he was notified that he would be fired.[113] OE Staff recognizes the existence of a potential financial motive, but argues, in light of the other evidence, that any financial incentive does not erode the witnesses' credibility.[114]

c. Commission's Determination

49. We deny Respondents' motion to dismiss on the basis of witness credibility (or lack thereof). Respondents themselves acknowledge that "the credibility of Enforcement Staff's witnesses and material facts and issues are in dispute."[115] Disputes over the veracity of witnesses, including whether issues such as consistency, financial motive, and the witnesses' grasp of trading strategies support or undermine their credibility, are precisely the type of factual issues to set for an evidentiary hearing. Whether or not Wilson and Callender are credible, and whether and to what degree their statements bear on the question of whether Respondents violated NGA section 4A and the Anti-Manipulation Rule, must be determined at an evidentiary hearing.

2. Sufficiency of OE Staff's Trading Analysis

50. Respondents allege that "Enforcement Staff's analysis of TGPNA's trading activity is fundamentally flawed" such that it "cannot sustain Enforcement Staff's

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[108] Staff Reply at 10.

[109] *Id.* at 10-14; Staff Report at 83.

[110] Staff Reply at 10-14; Staff Report at 85.

[111] Staff Reply at 10-14; Staff Report at 83.

[112] Staff Reply at 11.

[113] *Id.*; Staff Report at 85.

[114] Staff Reply at 11; Staff Report at 83, 86.

[115] Answer at 2, 20.

allegations and does not corroborate Wilson's and Callender's allegations."[116] To the extent Respondents invoke this argument in support of their claim that the Commission should dismiss all claims against them, they necessarily argue that there are no genuine issues of material fact related to the trading data and its interpretation, and that no reasonable trier of fact could find that the data support a charge of market manipulation.

51. The Parties disagree in almost all particulars about the relevant trading data, how it should be analyzed, and how any analysis bears on the question of whether Respondents violated NGA section 4A and the Anti-Manipulation Rule. While OE Staff articulates why the data show that Respondents engaged in physical bidweek trading to move index prices and thereby manipulate derivative financial positions, Respondents contend that the data instead show that Respondents were engaged in what they call a legitimate physical basis trading strategy.[117] Both allege that the other party has mischaracterized testimony, documents, and data, and engaged in flawed analysis.[118] Respondents also allege that OE Staff cannot prove manipulation with a detailed analysis of only five bidweeks,[119] while OE Staff underscores that those bidweeks are merely illustrative of a scheme evidenced by the data to have occurred in 38 bidweeks.[120]

52. Respondents' motion for summary disposition on the grounds that the trade data and analysis establish that there was no manipulation is denied. Respondents have failed to show, as they must, that there is no genuine issue of material fact regarding the trading behavior at issue. Indeed, the briefs submitted by the Parties underscore the need for detailed fact finding concerning what data should be examined, what analysis of that data is to be credited, and what conclusions such data support. Accordingly, such issues should be taken up by the ALJ at an evidentiary hearing.

IV. Contentions concerning Liability of Particular Respondents

53. In this section, we address contentions related to the liability of particular Respondents. These include (1) various contentions as to why the Commission may not proceed against the three corporate respondents (Total, TGPL, and TGPNA) and (2)

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[116] *Id.* at 8-10, 43.

[117] Staff Reply at 21-24; Answer at 77-91.

[118] Answer at 95-105; Staff Reply at 14-21, 26-29.

[119] Answer at 56.

[120] Staff Reply at 19-20.

contentions that individual respondents Tran and Hall may not be held liable under the NGA, either through their own actions or through the conduct of Wilson.

A. Corporate Liability

54. The Order to Show Cause directs Total and TGPL to show cause why they should not be held liable for TGPNA's, Hall's, and Tran's conduct and be held jointly and severally liable for their disgorgement and civil penalties, based on Total's and TGPL's significant authority and control over TGPNA's daily operations.[121]

55. Respondents present two arguments on this point in their answer. First, Respondents argue that the Commission lacks personal jurisdiction over Total and TGPL, because they are foreign corporations without sufficient contacts with the United States to justify Commission jurisdiction.[122] Second, Respondents argue that, even if the Commission has jurisdiction over Total and TGPL, they did not exercise sufficient control over TGPNA to enable them to be held liable for the acts of TGPNA or its employees.[123]

56. In addition, Respondents argue that TGPNA cannot be held liable for the acts of its (now former) employee, Wilson, to the extent that those acts were outside the scope of his employment.[124]

1. Personal Jurisdiction over Total and TGPL

57. Respondents argue that the Commission cannot proceed against Total and TGPL unless it first establishes personal jurisdiction over those entities in this proceeding.[125] To establish personal jurisdiction, Respondents argue, OE Staff must show that Total and TGPL have sufficient contacts with the United States for general or specific jurisdiction to exist, either through each company's own contacts or by imputing the contacts of TGPNA to Total and TGPL.[126]

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[121] Order to Show Cause, 155 FERC ¶ 61,105 at P 2.

[122] Answer at 160-63.

[123] *Id.* at 163-64.

[124] *Id.* at 142-44.

[125] *Id.* at 160-63 (citing *SEC v. Carrillo*, 115 F.3d 1540, 1543 (11th Cir. 1997)).

[126] *Id.* at 160.

58. In general, courts may exercise personal jurisdiction over a foreign defendant if the defendant has "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[127] There are two categories of personal jurisdiction: general and specific.[128]

59. General jurisdiction allows a court to hear any and all claims against a foreign corporation when the corporation's contacts with the forum State "'are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'"[129] A corporation's place of incorporation and principal place of business are considered the "paradigm" bases for general jurisdiction, as they are easily ascertainable and they "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."[130]

60. Specific jurisdiction applies where the suit arises out of, or relates to, a defendant's contacts with the forum State.[131] For purposes of specific jurisdiction, the "minimum contacts" analysis has three elements: (1) the contacts must be related to or give rise to the cause of action, (2) the defendant must have purposefully availed itself of the privilege of conducting activities within the forum, and (3) the defendant's contacts with the forum must be such that the defendant should reasonably anticipate being haled into court there.[132] As discussed more fully below, where, as here, a party is attempting to establish specific jurisdiction over foreign corporate entities that are related to a U.S.-based corporation, such jurisdiction can be established in one of two ways: (1) by analyzing the contacts of the foreign entities alone,[133] or (2) under appropriate

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[127] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

[128] *Daimler AG v. Bauman*, 571 U.S. 117, 126-27 (2014) (citing *Int'l Shoe,* 326 U.S. 310). As the Supreme Court has noted, "[s]ince *International Shoe*, 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'" *Id.* at 128 (citations omitted).

[129] *Id*. at 127 (citations omitted). *See also, Amaranth Advisors LLC*, 124 FERC ¶ 61,050 (2008).

[130] *Daimler AG*, 571 U.S. at 137.

[131] *Id*. at 127 (citations omitted).

[132] *See Carrillo*, 115 F.3d at 1542 (citations omitted). *See also, Third Nat'l Bank in Nashville v. WEDGE Group Inc.*, 882 F.2d 1087, 1089-90 (6th Cir. 1989) (citations omitted); *Amaranth Advisors*, 124 FERC ¶ 61,050.

[133] *Int'l Shoe*, 326 U.S. 310; *C.W. Downer & Co. v. Bioriginal Food & Science Corp.*, 771 F.3d 59, 67 (1st Cir. 2014) (holding foreign corporation subject to specific

circumstances, by imputing the contacts of the U.S. corporation to its foreign related entities as an "alter ego" of the U.S. corporation.[134] Imputing the contacts of the U.S. corporation is appropriate, for example, where the foreign related entities are shown to be alter egos of the U.S. corporation.

61. In examining this issue, we note that both OE Staff and Respondents acknowledge that the relevant inquiry concerns Total's and TGPL's contacts with the United States as a whole. That is because, when seeking to bring a claim under a federal statute authorizing nationwide service of process, "personal jurisdiction may be assessed on the basis of the defendant's national contacts[.]"[135] NGA section 24 states that in bringing suits to enforce liabilities or enjoin violations, "process . . . may be served wherever the defendant may be found[,]"[136] so personal jurisdiction should be assessed based on Respondents' contacts with the United States, instead of with any specific district.

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jurisdiction where it contracted with a Massachusetts investment bank and "actively caused [the plaintiff] to undertake extensive activities on [the defendant's] behalf within Massachusetts").

[134] *Patin v. Thoroughbred Power Boats Inc*., 294 F.3d 640, 653 (5th Cir. 2002) ("federal courts have consistently acknowledged that it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court.") (collecting cases); *Rojas v. Hamm*, No. 18-cv-01779-WHO, 2019 WL 3779706, at *8 (N.D. Cal., Aug. 12, 2019) ("The alter ego theory of specific jurisdiction allows the contacts of the local subsidiary to be imputed to the foreign parent corporation when 'the foreign entity is not really separate from its domestic affiliate.'") (quoting *Williams v. Yamaha Motor Co. Ltd*., 851 F.3d 1015, 1021 (9th Cir. 2017)); *Linus Holding Corp. v. Mark Line Indus., LLC*, 376 F. Supp. 3d 417, 423 (D.N.J. 2019) ("[A] court may impute the contacts of a subsidiary corporation to a foreign parent corporation for the purpose of exercising specific jurisdiction, if the subsidiary corporation is merely operating as the parent corporation's alter ego, such that the 'independence of the separate corporate entities [may be] disregarded.'") (quoting *Fisher v. Teva PFC SRL*, 212 Fed. Appx. 72, 76 (3d Cir. 2006) (citations omitted)).

[135] *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002) (citing cases from the First, Fifth, Sixth, and Eleventh Circuits); *Carrillo*, 115 F.3d at 1543.

[136] 15 U.S.C. § 717u.

a. Respondents' Position

62. Respondents contend that neither general nor specific personal jurisdiction can be exercised over Total and TGPL in this proceeding.[137] With respect to general jurisdiction, citing the Supreme Court's decision in *Daimler AG v. Bauman*,[138] Respondents argue that Total and TGPL's contacts with the United States are not "'so 'continuous and systematic' as to render [it] essentially at home in the' United States."[139] Because Total is headquartered in Paris, and TGPL is in London, they do not fit the "paradigm" bases for giving rise to general jurisdiction in the United States.[140] Respondents argue that if the defendant's contacts in *Daimler AG*—in which a foreign car company had a regional office in California and was the largest car supplier in California—were not enough to establish general jurisdiction, then the fact that Total and TGPL issue debt, market their stocks, and market production assets, all within the United States, would also be insufficient to establish general jurisdiction over Total and TGPL.[141] Similarly, Respondents argue that the fact that Total and TGPL oversaw TGPNA operations or that management occasionally visited the United States is insufficient to establish general jurisdiction.[142]

63. With respect to specific jurisdiction, focusing on the requirement that there be a link between Respondents, the forum, and the litigation, Respondents assert that Total's and TGPL's commercial activity in the United States (e.g., issuing debt) is not related in any way to this matter involving TGPNA's alleged manipulation in natural gas markets.[143] Respondents also argue that Total's and TGPL's oversight of TGPNA also does not give rise to specific jurisdiction, since it does not show that they purposefully

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[137] Answer at 160-64.

[138] 571 U.S. 117.

[139] Answer at 160-61 (quoting *Daimler AG*, 571 U.S. at 127).

[140] *Id.* at 160-61; *see also Daimler AG*, 571 U.S. at 137.

[141] Answer at 161 (citing *Daimler*, 571 U.S. at 123-24).

[142] *Id.* at 161-62 (citing *In re Terrorist Attacks on Sept. 11, 2001*, 718 F. Supp. 2d 456, 472-73 (S.D.N.Y. 2010)).

[143] *Id.* at 162-63.

availed themselves of conducting activities in the United States or that they invoked the benefits and protection of its law.[144]

64. Finally, Respondents argue that there is no legal or factual basis on which to impute the United States contacts of TGPNA to Total or TGPL for purposes of establishing personal jurisdiction.[145] Respondents correctly state that, as a matter of law, there is a strong presumption of institutional independence between related corporations that can only be overcome by clear evidence that one corporation so controls the other as to make it an alter ego or agent.[146] In order to impute a subsidiary's contacts to its parent, Respondents argue, OE Staff must show that Total and TGPL "'so dominate[ ] the subsidiary corporation as to negate its separate personality.'"[147] Respondents claim that OE Staff has greatly overstated the extent of Total's and TGPL's involvement and control of TGPNA.[148] Respondents contend the opposite; that the role played by Total and TGPL in setting TGPNA's general long-term business strategy was consistent with their ownership of TGPNA and was not sufficiently controlling to defeat TGPNA's

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[144] *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), *Int'l Shoe*, 326 U.S. at 317).

[145] *Id.* at 163-64.

[146] *Id.* at 163 (citing *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir. 1980)). *See also Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.,* 288 F.3d 1264, 1272 (11th Cir. 2002) (citing Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1069.4 (3d ed. 2002) (Where "the subsidiary is merely an agent through which the parent company conducts business in a particular jurisdiction or its separate corporate status is formal only and without any semblance of individual identity, then the subsidiary's business will be viewed as that of the parent and the latter will be said to be doing business in the jurisdiction through the subsidiary for purposes of asserting personal jurisdiction.")); *Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 338 (5th Cir. 1999) (same).

[147] Answer at 163 (quoting *Atlantigas Corp. v. Nisource*, *Inc.*, 290 F. Supp. 2d 34, 48 (D. D.C. 2003)). *See also Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 450-51 (6th Cir. 2012); *Diamond Chem. Co., Inc. v. Atofina Chem., Inc.*, 268 F. Supp. 2d 1, 7 (D.D.C. 2003) ("Ordinarily, a defendant corporation's contacts with a forum may not be attributed to…affiliated corporations. An exception exists, however, where affiliated parties are 'alter egos' of a corporation over which the Court has personal jurisdiction; in that case the corporation's contacts may be attributed to the affiliated party for jurisdictional purposes.") (citations and quotations omitted).

[148] *Id.* at 163-64.

corporate separateness.[149] Respondents thus assert that (1) without sufficient minimum contacts by Total and TGPL, on their own, and (2) without a basis to impute TGPNA's contacts to Total or TGPL, we cannot establish personal jurisdiction over these entities.[150]

b. OE Staff's Position

65. OE Staff notes that to establish personal jurisdiction at this stage in the proceeding it only needs to allege facts that, if proven at a hearing, would show that Total and TGPL have sufficient contacts with the United States.[151]

66. OE Staff argues that the Commission can exercise general personal jurisdiction over Respondents, asserting that Total and TGPL each have sufficiently "continuous and systematic" activities so as to render them at home in the United States. With respect to Total, OE Staff points to the following activities within the United States to establish general jurisdiction: issuing debt, marketing stock and production assets, and providing credit guarantees for TGPNA. With respect to TGPL, OE Staff points to TGPL's trading of natural gas products as a sufficient United States activity to establish general jurisdiction.[152]

67. OE Staff also argues that the Commission can exercise personal jurisdiction over Total and TGPL based on their alter-ego relationship with TGPNA.[153] OE Staff asserts that many of the factors courts use when establishing jurisdiction based on an alter-ego relationship are present here, such as:

- Common officers or directors;
- Common marketing image;
- Common trademark or logo;
- Common use of employees;

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[149] Answer at 164 (citing *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) ("'a parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is consistent with the parent's investor status.'") (citation omitted)).

[150] Answer at 164.

[151] Staff Reply at 65.

[152] Staff Report at 91-93; Staff Reply at 68-70.

[153] Staff Report at 90-91; Staff Reply at 65-67 (citing *Shapiro*, *Lifschitz & Schram*, *P.C. v. Hazard*, 24 F. Supp. 2d 66, 70 (D. D.C. 1998)).

- Integrated sales system;
- Interchange of managerial and supervisory personnel;
- Financing of the subsidiary by the parent;
- Undercapitalization of the subsidiary;
- The subsidiary's lack of assets apart from the parent; and
- Parent paying salaries of the subsidiary.[154]

Because of the presence of each of these factors, OE Staff disputes Respondents' assertion that they have overstated the evidence on the extent to which Total and TGPL controlled TGPNA.

68. In addition to their arguments on specific and general personal jurisdiction, OE Staff adds that important policy justifications require exercising personal jurisdiction over Total and TGPL.[155] In particular, OE Staff argues that including Total and TGPL is necessary to prevent them from allowing their undercapitalized operations in Houston to manipulate markets and avoid consequences due to insufficient funds. OE Staff also argues it is fair and reasonable to exercise personal jurisdiction over Total, and TGPL given their significant presence in the United States through TGPNA, Total, and TGPL managements' frequent travel to the United States, and the fact that Total has initiated proceedings in the United States in the past.[156]

c. Commission's Determination

69. Based on the record presented, the Commission concludes that OE Staff has failed to establish any facts supporting a claim of general jurisdiction over Total and TGPL. As explained in the following paragraph, we do not decide whether general jurisdiction might exists based on evidence showing that Total and TGPL are alter egos of TGPNA. Should that question be relevant following a hearing, the Commission may then choose to decide it. As to general jurisdiction on the record now before the Commission, the facts do not suggest that either Total or TGPL can be considered "essentially at home" in the United States. It is undisputed that Total and TGPL are neither incorporated in the United States, nor do they have their principal place of business in the United States. As such, they do not meet the "paradigm bases" for general jurisdiction set forth in *Daimler AG*. While these are not the only locations in which general jurisdiction exists, the Supreme Court has observed that a "corporation that operates in many places can

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[154] Staff Report at 91 (citing *Cali v. East Coast Aviation Servs., Ltd.*, 178 F. Supp. 2d 276, 286 (E.D.N.Y. 2001)).

[155] Staff Reply at 69-70.

[156] *Id.* at 70.

scarcely be deemed at home in all of them."[157] Thus, it requires an "exceptional case" to find general jurisdiction outside of the place of incorporation or principal place of business.[158] This is not an exceptional case. General jurisdiction over Total and TGPL absent an alter ego relationship is not present.

70. However, we set for hearing the issue of whether specific jurisdiction can be exercised over Total and TGPL in this matter, as alter egos of TGPNA. In determining whether Total and TGPL are alter egos for TGPNA, their level of control over the activities of TGPNA is of primary importance. We determine that the written submissions do not provide an adequate basis for resolving the many material factual issues as to Total and TGPL's control over TGPNA's activities. We note that alter ego jurisdiction could be either general or specific. Because these proceedings arise out of the actions of TGPNA, if Total and TGPL are found to be alter egos of TGPNA, specific jurisdiction would readily be established. Accordingly, we would not need to determine whether the evidence supported a separate determination that staff met the "higher bar" of proving general jurisdiction. We are accordingly setting this hearing for a determination of whether specific personal jurisdiction can be exercised over Total and TGPL on an alter ego theory.

2. Liability of Total and TGPL for TGPNA

71. Assuming the Commission has specific jurisdiction over Total and TGPL, the Commission must also find that, despite their status as separate corporations from TGPNA, Total and TGPL can be held liable for the conduct of TGPNA and its employees, Hall and Tran.

72. OE Staff recommends that the Commission hold Total and TGPL liable for TGPNA's conduct, arguing that TGPNA, Hall, and Tran should not be allowed to escape

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[157] *Daimler AG*, 571 U.S. at 139 n.20.

[158] *Id.* at 139 n.19 ("We do not foreclose the possibility that in an exceptional case, . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.") (citation omitted). *See also, Kipp v. Ski Enter. Corp. of Wis., Inc.*, 783 F.3d 695, 698 (7th Cir. 2015) ("In recent years, the Supreme Court has clarified and, it is fair to say, raised the bar for this type of jurisdiction. Because general jurisdiction exists even with respect to conduct entirely unrelated to the forum state, the Court has emphasized that it should not lightly be found."); *In re M/V MSC FLAMINIA*, 107 F. Supp. 3d 313, 319 (S.D. N.Y. 2015) (applying "exceptional case" standard); *Barone v. Intercontinental Hotels Grp. PLC,* No. 15-cv-04990-JCS, 2016 WL 2937502, at *7 (N.D. Cal., May 20, 2016) (same).

liability.[159] OE Staff contends that holding Total and TGPL liable for TGPNA's, Hall's and Tran's conduct, "is necessary to prevent them from allowing their undercapitalized 'Houstonian trading office' to manipulate United States natural gas markets for years and then avoid the consequences due to insufficient funds."[160] OE Staff argues that TGPNA is merely a trading office with limited assets (and no natural gas assets) of its own.[161] OE Staff points to the testimony of TGPL's Vice President of Trading and TGPNA's Chairman, who testified about TGPNA's financial "problems" and to evidence that Total has provided credit guarantees to TGPNA counterparties for purposes of establishing credit relationships because of TGPNA's lack of sufficient credit.[162] OE Staff presents several alternative theories of liability: the "single entity" doctrine, corporate veil piercing or alter ego theories, and agency theory.[163]

73. Under the single entity doctrine, the Commission looks to whether the corporate form, intentionally or not, frustrates the purpose of a federal statute.[164] Under the veil piercing or alter ego theories, the Commission looks to whether there is such a unity of interest and ownership that the separate corporate forms no longer exist, and whether failure to disregard the corporate form results in fraud or injustice.[165] Finally, under agency theory, the Commission looks to whether TGPNA acted for the benefit, and subject to the control, of Total and TGPL.[166] While the standard for establishing the single entity theory is less burdensome than the other theories presented,[167] analysis under

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[159] Staff Report at 77.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 77, 80, 82 n.371.

[164] *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Svcs.*, 127 FERC ¶ 61,269, at P 221 (2009).

[165] *William Valentine & Sons, Inc.*, 46 FERC ¶ 61,252, at 61,749 (1989) (citations omitted).

[166] *See, e.g., United States v. Habersham Props., Inc.*, 319 F. Supp. 2d 1366 (N.D. Ga. 2003); *EEOC v. Wal-Mart Stores, Inc.*, 11 F. Supp. 2d 1313 (D.N.M. 1998).

[167] *See, Sebastopol Meat Co. v. Sec'y of Agric.*, 440 F.2d 983, 985 (9th Cir. 1971) (In proceeding under Packers and Stockyards Act, stating, "[w]e do not think that state law limitations on the alter ego theory or doctrine are necessarily controlling in determining the permitted scope of remedial orders under federal regulatory statutes.")

each of these theories takes into account the totality of the circumstances and looks to the interconnectedness of the entities in question and the ability of one entity to control the other.[168]

74. The Staff Report points to several facts in support of OE Staff's argument that Total and TGPL should be held liable for TGPNA's conduct, including the following:

- Total established risk limits for TGPNA's traders, and TGPNA was required to seek TGPL's authority to exceed these limits;
- TGPNA relied upon Total and TGPL for capital, and frequently depended on parent company guarantees in establishing credit relationships in its trading business;
- Officers within TGPNA were required to report directly to TGPL and Total superiors rather than, or in addition to, TGPNA's own management;
- TGPL retained extraordinary administrative control over the daily operation of critical business components such as TGPNA's trading book and IT systems;
- Officers of Total and TGPL participated in biweekly steering committee meetings with TGPNA personnel where they discussed TGPNA trading issues, including positions and market views;
- Officers at TGPL participated in setting the trading strategies and budget of TGPNA, and approved certain staffing decisions as well as the structure of TGPNA's trade floor;
- Officers at Total and TGPL were briefed about the compliance issues at TGPNA that became the subject of this proceeding; and
- TGPNA is under-financed relative to the market harm at issue herein.[169]

a. Respondents' Position

75. Respondents contend that TGPNA operates as a separate business entity and that it transacts with TGPL and Total as distinct counterparties. Respondents further contend

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(citation omitted); *In re: Improving Pub. Safety Comm. in the 800 MHz. Band*, 25 F.C.C. Rcd. 13,874 at 13,887-89 (2010) (collecting cases, noting that "[t]his inquiry is distinct from the standards for 'piercing the corporate veil' or finding an 'alter ego' under common law.").

[168] *See Habersham Props.,* 319 F. Supp. 2d 1366; *EEOC v. Wal-Mart Stores, Inc.*, 11 F. Supp. 2d 1313*; San Diego Gas & Elec.*, 127 FERC ¶ 61,269 at P 221*; William Valentine & Sons, Inc.*, 46 FERC at 61,749.

[169] Staff Report at 79-82.

that Total and TGPL exercise only general oversight of TGPNA and do not control daily operations at TGPNA.[170]

76. Respondents dispute OE Staff's reasons for treating Total, TGPL, and TGPNA as a single corporate entity, pointing to factual flaws including the following:

- Risk Limits: Respondents state that Total established risk limits across all business units, not as an effort to manage or direct the operations of TGPNA. Each business unit determined for itself how to function within the limits set by Total. Moreover, Respondents state that once TGPNA is notified of its trading limits, TGPNA has the discretion to assign limits among its traders without any day-to-day oversight by Total or TGPL.[171]
- Parent Company Guarantees: Respondents argue that guarantees are a standard vehicle for conducting business, and do not mean that a parent has direct or active control over a subsidiary's operations.[172]
- TGPNA officers reporting directly to Total and TGPL: Respondents state that TGPNA's senior management team reports directly to TGPNA's CEO.[173]
- TGPL retention of administrative control of TGPNA's business operations: Respondents state that TGPL was not involved in the day-to-day details of TGPNA's trading activities, and that TGPL did not have control over, or even access to, trading data on TGPNA's servers.[174]
- Total and TGPL participation in biweekly steering with TGPNA personnel: Respondents argue that the biweekly meetings were more ad hoc than their name suggests, that only general views of TGPNA's trading activities and positions were discussed, and that the meeting participants never discussed specific products TGPNA's desks were trading or the strategies they were using.[175]
- TGPL involvement in TGPNA trading strategies, personnel decisions, and trading floor organization: Respondents argue that TGPL and TGPNA traders are not required to discuss trades with one another, even when trading the same product; TGPL traders did not know what TGPNA traders' positions were at any given

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[170] Answer at 105-10.

[171] *Id.* at 106.

[172] *Id.* at 110.

[173] *Id.* at 107.

[174] *Id.* at 105-06.

[175] *Id.* at 111.

time;[176] TGPNA employees managed and approved all hiring and termination of traders, and TGPL's Vice-President of trading in London at the time only had minimal involvement in hiring;[177] TGPNA's Vice President of Trading supervised all of TGPNA's trading and had autonomy to make strategic decisions about how to organize the trading floor;[178] the decision to reorganize the trading floor originated at TGPNA, not TGPL; and TGPNA's Vice President of Trading had sole authority to determine traders' salaries and performances and conducted performance reviews of trading desk managers.[179]

77. Respondents also argue that maintaining corporate separateness under the facts presented herein does not frustrate the purposes of the NGA or result in any fraud or injustice.[180] Specifically, Respondents argue that in *Central Bank of Denver v. First Interstate Bank of Denver*,[181] the Supreme Court held that language in the Securities Exchange Act —which is similar to the language used in NGA section 4A—does not impose aiding and abetting liability or any other method of secondary liability.[182]

78. Respondents posit that the true remedy sought by OE Staff is to hold Total and TGPL jointly and severally liable for purposes of collection of any future penalty assessed in this matter, which, Respondents argue, is an issue that must be resolved only in a subsequent collection action brought in federal district court. As OE Staff have set forth no claims of wrongdoing on the part of Total or TGPL, Respondents argue, these companies are not properly before the Commission.[183]

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[176] *Id.* at 105-06.

[177] *Id.* at 107.

[178] *Id.*

[179] *Id.* at 107-08.

[180] *Id.* at 165-66.

[181] 511 U.S. 164, 176 (1994).

[182] Answer at 165-66 (citing *Cent. Bank of Denver*, *N.A. v. First Interstate Bank of Denver*, *N.A.*, 511 U.S. at 176).

[183] *Id.* at 165-67.

b. OE Staff's Position

79. OE Staff argues that Respondents have made false, misleading, and unsupported statements regarding the extent to which Total and TGPL controlled TGPNA.[184] OE Staff also contends that many of the factors cited by Respondents (such as whether traders at Total and TGPL speak with traders at TGPNA) do not disprove that Total and TGPL had ultimate control over TGPNA.[185]

80. OE Staff describes TGPNA as an office operating within Total and TGPL, working under a common set of policies and goals, with Total and TGPL controlling a wide range of TGPNA's activities.[186] In further support of its position, OE Staff points to additional facts, including the following:

- TGPNA is described by Total as the "Houstonian trading office" or "North American trading arm" of Total's Global Gas Division.
- Total and TGPL participate in TGPNA's strategic trading activities and decisions within the trading limits set by Total.
- The TGPNA bonuses approved by Total are determined based on Total's global reserve.
- TGPL required TGPNA to ban "out of hours" trading.[187]

81. OE Staff emphasizes that the single entity doctrine is not dependent on a showing of control, but is instead a flexible doctrine that takes into account the totality of the circumstances, including policy implications. OE Staff urges the Commission to "apply the single entity doctrine here to prevent Total, TGPL, and TGPNA from frustrating the NGA's purpose of deterring and punishing market manipulation by turning a penalty against an undercapitalized TGPNA into a nullity."[188]

82. OE Staff contends that veil piercing is appropriate for the same reasons that support application of the single entity doctrine, arguing that "TGPNA operates as a

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[184] Staff Reply at 34-36.

[185] *Id.* at 35.

[186] *Id.* at 29, 31.

[187] *Id.* at 29-35.

[188] *Id.* at 71-72.

controlled component of Total and TGPL, and adherence to the corporate fiction would allow TGPNA to escape the consequences of" its manipulative trading activity.[189]

83. In addition, OE Staff contends that Total and TGPL can be held liable for TGPNA's conduct under traditional agency theory, which holds a principal liable for the fraudulent acts of its agent when the agent is acting under the control and direction of the principal and the principal has consented to the agent's acting on its behalf.[190]

84. OE Staff also explains that it is not seeking aiding and abetting liability—making *Central Bank* irrelevant to this proceeding—and argues that in any event, the Commission has held multiple times that *Central Bank* applies only to private civil liability under the Securities Exchange Act and not to government enforcement actions.[191]

85. Rather than set this issue for a hearing, OE Staff asks that the Commission find, as an undisputed fact, that TGPNA operates as an office within and under the control of Total and TGPL, and decide on the record that Total and TGPL should be considered as a single entity with TGPNA.[192]

c. Commission's Determination

86. We note at the outset that, in some respects, this issue relies on similar facts and analysis as the personal jurisdiction issue, discussed above. In particular, questions regarding the level of control exercised by Total and TGPL over TGPNA, and whether,

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[189] *Id.* at 72.

[190] *Id.* at 72-73.

[191] *Id.* at 74-75 (citing *Coaltrain, Energy*, 155 FERC ¶ 61,204 at P 352; *Barclays Bank*, 144 FERC ¶ 61,041 at P 37). *But see* the subsequent decision in *FERC v. Coaltrain Energy L.P.*, 2018 WL7892222 at *18 (S.D. Ohio 2018) (noting that *Central Bank* found that the SEA, which contains "virtually identical language" to the FPA, did "not reach those who only aid or abet a violation," concluding that "just as only the 'making' of a material misstatement (or omission) suffices for primary liability under Rule 10b-5(b), only the 'use' or 'employment' of a scheme or course of business to defraud suffices for primary liability under [the FPA]," and citing *Federal Energy Regulatory Commission v. Silkman*, 177 F.Supp. 3d 683 at 707 (D. Mass. 2016) for the same conclusion ("in enacting FPA Section 222 and the Anti-Manipulation Rule, Congress and FERC can be presumed to have limited the reach of those provisions to primary violators.")).

[192] Staff Reply at 9-10, 35-36.

under the circumstances presented herein, the separate corporate identities should be respected, will impact both the jurisdictional analysis and the liability analysis.

87. On the issue of whether Total and TGPL can be held liable for the conduct of TGPNA, under any of the theories presented, we determine that the written submissions do not provide an adequate basis for resolving the disputes over many material facts.[193] We conclude that further development of the record is necessary before a determination can be made as to the liability of Total and TGPL for the conduct of TGPNA. In particular, facts regarding TGPNA's financial state, Total and TGPL's level of control over TGPNA's activities, and the extent to which corporate formalities have been observed, particularly in the companies' dealings with each other, must be established. As a result, we set this issue for hearing.

3. Liability of TGPNA for Wilson

88. Apart from the issue of Total and TGPL's liability for the conduct of TGPNA, Respondents also argue that TGPNA cannot be held vicariously liable for the acts of its (now former) employee, Wilson, even assuming that Wilson's trading was improper and Wilson knew it to be so, because those acts were outside the scope of his employment.[194]

a. Respondents' Position

89. Respondents argue that under federal common law principles, an act is not within the scope of a person's employment "'if it is done with no intention to perform it as a part of or incident to a service on account of which [the employee] is employed.'"[195] They further argue that Wilson was not acting under the scope of his employment because he admitted that he was not directed to engage in the trading that caused him to call the Commission's Enforcement Hotline.[196] And even if Wilson did believe that his own trading was improper, Respondents contend that TGPNA cannot be vicariously liable because they argue that Wilson acted solely for his own benefit.[197] In support of the

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[193] We also find that the issue of whether TGPNA operates as an office within and under the control of Total and TGPL is not an undisputed factual issue, as OE Staff contends. Rather it is one of several factual issues disputed by the Parties that shall be set for hearing.

[194] Answer at 142-44.

[195] *Id.* at 142 (quoting Restatement (Second) of Agency § 235).

[196] *Id.* at 142-43.

[197] *Id.* at 143.

argument that Wilson was acting on his own behalf, Respondents imply that Wilson may have colluded with Callender to benefit financially from whistleblowing, borne in part by Wilson's alleged animus towards Tran.[198] Defendants raise the possibility that discovery could answer "important questions" about Wilson's motivations and thus whether Wilson was "acting outside the scope of his employment when he conducted the trades at issue."[199]

b. OE Staff's Position

90. OE Staff replies that Respondents cherry-picked from the Second Restatement of Agency and thus misconstrue the law when they argue that Wilson acted outside the scope of his employment.[200] Read in full, they note, the Second Restatement of Agency establishes an inference that an employee is acting within the scope of his employment when he is doing the kind of act he is authorized to perform within working hours at an authorized place, an inference that Respondents must rebut by proving that an employee is acting solely for his own purpose.[201]

91. OE Staff argues that Respondents' attempt to disclaim Wilson's trading as Wilson's own is based on a series of statements to the effect that Wilson's superiors never directed him to trade fixed price during bidweek to affect index prices.[202] The fact that TGPNA employees did not admit to Wilson that they were attempting to manipulate index prices, asserts OE Staff, does not support the conclusion that Wilson made his trades for TGPNA on his own account.[203]

c. Commission's Determination

92. Well-established Commission precedent provides companies are responsible for manipulative trades placed by their employees.[204] Principles of common-law tort, and in

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[198] *Id.* at 143-44.

[199] *Id*. at 143, 142.

[200] Staff Reply at 63-65.

[201] *Id.* at 64.

[202] *Id*.

[203] *Id.*

[204] *See Amaranth Advisors L.L.C.,* 120 FERC ¶ 61,085 (2007) ("We routinely sanction a company for the actions of its employees.") (citing cases) *See also Barclays Bank*, 114 FERC ¶ 61,041 at P 36 (rejecting as artificial an argument that the Commission

particular vicarious liability apply to determine when a corporation is responsible for the violative conduct of its employees.[205] Accordingly, the Commission looks to whether an employee was acting within the course of their employment when engaged in the alleged manipulation and thus to factors such as whether the alleged manipulation was undertaken during the course of the employee's assigned duties, and was subject to the employer's control.[206] Only if is undertaken "for the sole purpose of furthering the employee's interests or those of a third party" may an employer escape liability for the actions of an employee undertaken during the course of an employee's work.[207]

93. Based on the undisputed facts in the record, we conclude that Wilson was acting within the scope of his employment at the time he participated in the alleged manipulative scheme. Wilson was employed from 2009 – 2012 by TGPNA as an analyst and trader on its West Desk.[208] Wilson was employed for the purpose of trading on TGPNA's behalf in the natural gas markets.[209] Wilson's trading was supervised by Hall, who was supervised by TGPNA's Vice President of Trading, with whom Hall had daily discussions about the West Desk's positions.[210] Wilson's trades were tracked by

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must find "group vicarious liability" before finding liability for manipulative trades, and stating "[i]n any case, however, [the anti-Manipulation Rule] provides the Commission with broad authority to address all attempts to manipulate wholesale energy markets, making no distinction between individuals or groups that may undertake such efforts."); *BP Am.*, 156 FERC ¶ 61,013; *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 (2013) (Order Approving Stipulation and Consent Agreement); *Energy Transfer Partners L.P*, 128 FERC ¶ 61,269 (2009) (Order Approving Uncontested Settlement).

[205] *Amaranth Advisors,* 120 FERC ¶ 61,085 ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously punishable for acts of their agents or employees in the scope of their authority or employment."). *See also Crude Co. v. FERC*, 135 F.3d 1445, 1455 (Fed. Cir. 1998) (endorsing the Commission's analogy to common law tort principles of vicarious liability).

[206] *See* Restatement (Second) of the Law – Agency § 235; Restatement (Third) of the Law – Agency at § 7.07.

[207] *Id.*

[208] Staff Report at 3-4, 5-13.

[209] *Id.*; Testimony of Aaron Hall, July 26, 2012, at 27-28 (Hall Testimony).

[210] Staff Report at 3-4, 5-13; Hall Testimony at 38-39.

TGPNA's Middle Office and published on a daily basis in a report referred to as "The Book."[211] These facts are not in dispute.

94. Wilson need not have been directed to engage in the particular trades at issue for TGPNA to be liable for those trades, should they be proven to be manipulative. This is so because Wilson acted on behalf of TGPNA: he was vested by TGPNA with authority to engage in natural gas trading on behalf of the West Desk, his trading accrued directly to the benefit or detriment of the West Desk's P&L, which in turn flowed directly to TGPNA. For purposes of this analysis, we assume as true Wilson's statement, cited by Respondents, that "I was never directed to do anything" and find, on the record presented, that Wilson's trading activity was nonetheless precisely the kind of act that fell within the scope of his employment.

95. Respondents imply a conspiracy between Wilson and Callender, by which they intended to benefit from whistleblowing. Respondents fail to identify a single plausible theory under which they might prove through discovery and trial that Wilson's sole motive in trading was in furtherance of such a conspiracy, as would be required to establish that TGPNA is not responsible for Wilson's allegedly manipulative trading. Nonetheless, in the face of Respondents' claim that relevant evidence is potentially forthcoming, the Commission reserves its final determination on this matter for following hearing. As such, the Commission sets this issue for hearing.

B. Individual Liability

1. Individual Liability Generally Under the NGA

96. The Staff Report recommends that the Commission hold Tran and Hall individually liable under NGA section 4A and the Anti-Manipulation Rule. However, Tran and Hall contend that NGA section 4A and the Anti-Manipulation Rule do not apply to individuals. They point out that section 4A provides that it shall be unlawful "for any *entity* . . . to use or employ . . . any manipulative or deceptive device or contrivance . . . [emphasis supplied]."[212] They argue that the term "entity" does not include individuals.[213]

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[211] Hall Testimony, at 41-42.

[212] Answer at 179 (quoting the Anti-Manipulation Rule, 15 U.S.C. § 717c-1; 18 C.F.R. § 1c.1).

[213] Answer at 179-83.

a. Respondents' Position

97. Respondents assert that because NGA section 4A prohibits manipulation by an "entity," Congress intended section 4A to apply only to corporations or organizations, and not individuals. Respondents invoke several canons of statutory construction to support this assertion.[214]

98. First, Respondents argue that the ordinary meaning of the word "entity" controls, and that the ordinary meaning excludes natural persons.[215]

99. Second, Respondents note that in the NGA and the Energy Policy Act of 2005 (EPAct 2005),[216] Congress used both the word "individual" and the phrase "individuals and entities" throughout the statue.[217] If "entity" is interpreted to include individuals, Respondents argue, then reference to individuals would be superfluous, particularly in phrases that reference "individuals and entities."[218]

100. Third, Respondents contend that the fact that the anti-manipulation provisions in the NGA were modeled after those in the Securities and Exchange Commission (SEC) statute supports their position that "entity" does not include individuals.[219] Respondents note that the language Congress used for NGA section 4A is almost identical to that used for the parallel Securities Exchange Act of 1934, but that act uses the word "person" rather than "entity" in its anti-manipulation provision.[220] Respondents assert that Congress's word change was intentional, and evidence that Congress did not intend for NGA section 4A to apply to individuals.[221]

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[214] *Id.*

[215] *Id.* (citing Black's Law Dictionary (10th ed. 2014) and Black's Law Dictionary (8th ed. 2004); *Samantar v. Yousuf*, 560 U.S. 305, 315 (2010); *Am. Dental Assoc. v. Shalala*, 3 F.3d 445 (D.C. Cir. 1993)).

[216] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

[217] Answer at 181.

[218] *Id.*

[219] *Id.* at 181-82.

[220] *Id.* at 182.

[221] *Id.*

101. Finally, while Respondents acknowledge that multiple courts have held that the word "entity" can refer to individuals in section 222 of the FPA—a parallel provision banning manipulation in electric energy markets—they claim that these cases are not binding and were erroneously decided.[222]

b. OE Staff Position

102. OE Staff responds that the Commission has rejected the line of argument urged by Respondents and has repeatedly imposed sanctions against individuals under its Anti-Manipulation Rules.[223] OE Staff also notes that every federal court to consider this issue has agreed with the Commission.[224]

c. Commission's Determination

103. The Commission rejects Respondents' arguments that NGA section 4A does not apply to individuals because it prohibits manipulation by an "entity." The Commission has consistently interpreted the word "entity" in NGA section 4A[225] (and the similar FPA section 222[226]) to include individuals. In Order No. 670, the Commission explained, "'[a]ny entity' is a deliberately inclusive term. Congress could have used the existing defined terms in the NGA and FPA of 'person,' 'natural-gas company,' or 'electric utility,' but instead chose to use a broader term without providing a specific definition. Thus, the

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[222] *Id.* at 182-83.

[223] Staff Reply at 82.

[224] *Id.* (citing *City Power Mktg.*, 199 F. Supp. 3d at 239-40 ("[the Court] agrees with the three other courts to have addressed this question that the term 'entity' in section 222 can include individuals"); *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 201 (D. Mass. 2016) (*Maxim Power Corp.*) (holding, through Chevron deference to the Commission's interpretation in Order No. 670, that the phrase "any entity" includes "any person or form of organization, regardless of its legal status, function or activities"); *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1146 (E.D. Cal. 2015) (concluding that "a meaning of 'entity' that includes natural persons appears more consistent with the goals of FPA § 222 and the surrounding statutory scheme"); *FERC v. Silkman*, 177 F. Supp. 3d 683, 710 (D. Mass. 2016) (*Silkman I)* ("Read together with the structural features of the FPA identified by the *Barclays* court, the term 'entity' in this statutory context appears best read to include individuals."); *Kourouma v. FERC*, 723 F.3d 274 (D.C. Cir. 2013)).

[225] 15 U.S.C. § 717c-1.

[226] 16 U.S.C. § 824v.

Commission interprets 'any entity' to include any person or form of organization, regardless of its legal status, function, or activities."[227] All Federal District Courts that have considered the issue have agreed with Order No. 670's interpretation of the word "entity" as including individuals in cases involving FPA section 222's prohibition of market manipulation.[228]

104. Respondents' arguments do not persuade us that we should modify our interpretation of NGA section 4A. Federal District Courts have found that FPA section 222's use of the word "entity" is ambiguous, and those courts have given *Chevron*[229] deference to Order No. 670's interpretation of the term "entity" as including individuals.[230]

105. Similar to the Federal District Courts' holdings with respect to FPA section 222, the NGA's statutory language and structure support an interpretation that the term "entity" as used in NGA section 4A includes individuals. For example, NGA section 21 provides that "any person" who willfully and knowingly does any act declared unlawful by the NGA may be punished by a fine of not more than $1 million or imprisonment. NGA section 22 provides that "any person" who violates the NGA may be subject to a civil fine of not more than $1 million. We further note the court's holding in *Maxim Power Corp.* with respect to FPA section 222:

> Given the context of these other provisions and the fact that FPA section 222 [identical to NGA section 4A] was enacted as part of the Energy Policy Act of 2005, which enhanced the FERC's civil penalty authority, it would be incongruous to read the statute as allowing enforcement against business entities engaging in market manipulation but precluding enforcement against the individuals who actually carry out the manipulative schemes.[231]

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[227] Order No. 670, 114 FERC ¶ 61,047 at P 18.

[228] *Coaltrain Energy*, 2018 WL 7892222, at *10; *City Power Mktg., LLC*, 199 F. Supp. 3d 218, 241; *Maxim Power Corp.*, 196 F. Supp. 3d at 201; *Silkman I*, 177 F. Supp. 3d at 710; *FERC v. Barclays Bank*, 105 F. Supp. 3d at 1146.

[229] *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984).

[230] *Coaltrain Energy,* 2018 WL 7892222, at *10; *City Power Mktg.,* 199 F. Supp. 3d at 240-41; *Maxim Power Corp.*, 196 F. Supp. 3d at 201; *Silkman I*, 177 F. Supp. 3d at 710-11.

[231] *Maxim Power Corp.*, 196 F. Supp. 3d at 201.

106. Respondents' citations to two cases that defined "entity" to exclude individuals also do not persuade us to change our position, as these two cases involved separate statutory schemes in which the courts' application of statutory construction yielded different outcomes. In *Samantar v. Yosuf*,[232] cited by Respondents,[233] the Supreme Court was interpreting the Foreign Sovereign Immunity Act (FSIA) to determine whether a Somalian military officer accused of torture and extrajudicial killings was an "entity" entitled to immunity as defined in the FSIA.[234] Noting the context around the word "entity" in FSIA "appl[ies] awkwardly, if at all, to individuals," the Court rejected the argument that FSIA granted the Somalian officer immunity.[235] In contrast to that case, including individuals within the scope of "any entity" applies naturally in section 4A, as manipulation cannot occur without the actions of individuals. And in *Am. Dental Assoc. v. Shalala*,[236] also cited by Respondents,[237] the D.C. Circuit Court of Appeals determined whether a statute requiring "entit[ies]" to report medical malpractice claims applied to individuals.[238] The D.C. Circuit held that "entity" in that statute did not apply to individuals, because the statute clearly defined "health care entity" to include hospitals and other medical organizations, and in other contexts in the statute used "entity" as shorthand for "health care entity."[239]

107. Unlike the cases Respondents cite, the NGA does not, either in its overall structure or in the purpose of section 4A, suggest that "any entity" should exclude individuals. In fact, as described above, every court to have considered the parallel anti-fraud

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[232] 560 U.S. 305 (2010).

[233] Answer at 180, 182.

[234] *Samantar*, 560 U.S. 305, 308-11.

[235] *Id.* at 315-16, 325-26.

[236] 3 F.3d 445.

[237] Answer at 180.

[238] *Am. Dental Assoc.*, 3 F.3d at 445-46.

[239] *Id.* at 447-48.

provision of the FPA has determined, after an analysis of the FPA's statutory language and structure, that the term "entity" includes individuals.[240]

108. For these reasons, we reject Respondents' argument, and maintain our longstanding position interpreting "'any entity' to include any person or form of organization, regardless of its legal status, function, or activities."[241] Accordingly, Tran and Hall can be held individually liable for violations of NGA section 4A and our Anti-Manipulation Rule. As such, we do not find the need to set this issue for hearing.

2. Liability of Therese Tran and Aaron Hall

109. The Staff Report alleges that Tran and Hall should be sanctioned individually for their role in the manipulation: Tran because she "is the individual most culpable for devising and executing the West Desk's manipulative trading scheme;"[242] and Hall because he supervised the West Desk from 2008 to mid-2011 and worked with Tran to initially devise the manipulative scheme.[243] In addition to disputing the applicability of the Anti-Manipulation Rule to individuals, Respondents challenge the sufficiency of the evidence against each of the individual respondents.

a. Respondents' Position

110. Tran asserts that the testimony of Wilson and Callender is biased and implausible and that other evidence demonstrates that there was no manipulation or intent to manipulate. In the purported absence of substantive evidence that Tran engaged in manipulative trading, Tran seeks to have the claims against her dismissed. Tran further argues that even if Wilson's "admissions" of personal misconduct are accepted as true, the NGA does not permit that either Wilson's conduct or his intent can be imputed to

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[240] *See Coaltrain Energy*, 2018 WL 7892222, at *10; *City Power Mktg.,* 199 F. Supp. 3d at 241; *Maxim Power Corp.*, 196 F. Supp. 3d at 201; *Silkman I*, 177 F. Supp. 3d at 710; *FERC v. Barclays Bank*, 105 F. Supp. 3d at 1146.

[241] Order No. 670, 114 FERC ¶ 61,047 at P 18.

[242] Staff Report at 82.

[243] *Id.* at 83.

Tran under theories of vicarious liability,[244] "aiding and abetting,"[245] conspiracy,[246] or because Tran was a "control person" at TGNPA.[247] Tran also submits there is no factual basis to impute Wilson's intent to Tran because Wilson repeatedly stated in his investigative testimony that "he did not know what Tran intended."[248]

111. Hall similarly seeks dismissal on the grounds that OE Staff will be unable to prove manipulative conduct or intent.[249] Hall asserts that the "central allegation" of the Staff Report is that the "West Desk, through Hall and Tran, traded monthly physical fixed price natural gas during bidweek at prices and in ways designed to move published index prices at those locations."[250] Hall points out, however, that he did not trade physical

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[244] Tran and Hall state that vicarious liability requires an agency relationship and that employees are agents of the corporation, not their supervisors. Answer at 167, 169 (citing *Meyer v. Holley*, 537 U.S. 280, 286, 290-91 (2003)); *Bustos v. Martini Club, Inc.,* 599 F.3d 458, 468 (5th Cir. 2010). However, Respondents Tran and Hall acknowledge that OE Staff has not argued that Tran is liable "merely for having supervised Wilson." Answer at 168 n.662. Hall separately concedes that OE Staff does not allege that Hall directly supervised Wilson, only that Hall is accused of being a "supervisor of the [alleged] manipulative scheme." *Id*.

[245] *See Silkman I*, 177 F. Supp. 3d at 707-08 (holding there is no aiding and abetting liability under FPA section 222 and Rule 1c.2). Tran argues that because the anti-manipulation sections of the FPA and NGA are "virtually identical," *Silkman I's* holding should apply to the liability under the NGA. Answer at 168 n.663; Order No. 670, 114 FERC ¶ 61,047 at PP 5-6.

[246] Answer at 169 n.666 (citing *Silkman I*, 177 F. Supp. 3d at 176-79).

[247] *Id.* at 168-69 (citing 15 U.S. § 78t(a)) (This argument is based on the absence of a control person liability provision in the NGA whereas the Securities Exchange Act of 1934 specifically provides for control person liability.).

[248] Answer at 169-70 (quoting excerpts from Wilson's testimony).

[249] Like Tran, Hall also claims that OE Staff's case for manipulative intent is based entirely on Wilson's "non-credible testimony." Answer at 178. More specifically, Hall argues that Wilson's testimony about Hall's effort to teach him about "the allegedly manipulative bidweek strategy is so rife with internal inconsistencies as to vitiate any claim premised upon it." *Id*.

[250] *Id.* (quoting Staff Report at 1).

natural gas in connection with 37 of the 38 point-months in the Staff Report.[251] For the one point-month in which he did trade physical gas, the January 2011 bidweek at SoCal, he argues that his trading "was economically rational, had a legitimate business purpose, and was consistent with the physical basis view adopted by the West Desk."[252] Hall also asserts that the evidence OE Staff cites to prove his manipulative intent is "grounded largely" on his testimony that "fixed price trades will have an effect on the published index price."[253] Hall argues that such a theory subjects "anyone who reports trades to an index publisher with the widespread, public knowledge of how index prices are calculated is engaged in market manipulation."[254] Lastly, Hall contests the Staff Report's conclusion that the decision to commingle TGPNA's traders' physical and financial positions into regional books was undertaken to disguise the manipulative scheme. To the contrary, Hall argues that OE Staff's position is illogical, without evidentiary support, and ignores Hall's un-contradicted testimony that there was a legitimate business reason for this record keeping change.[255]

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[251] *Id.* at 171. Hall specifically notes that he did not trade physically in connection with the five point-months discussed in the Staff Report and that for many of the point-months in the Staff Report he was not employed by TGPNA but by another Respondent, TGPL. *Id.* at 171, 174. Hall adds that the point-months in which he did work at TGPNA are time-barred or soon will be. Because we address Respondents' statute of limitations arguments, *infra* in section V, we do not address Hall's identical claims here.

[252] *Id.* at 171. Hall sets forth in detail why he believes his trading on Day 3 of the January 2011 SoCal bidweek was not manipulative including that he traded before and at the very beginning of a NYMEX price spike (which he claims was a feature of the physical basis approach) and because it created simple arbitrage opportunities. Hall also argues that the fact that he did not continue to trade as the NYMEX rose even higher, sold gas when the NYMEX started to rise, and did not trade on Day 4 after the price had risen, are all actions he says are inconsistent with a manipulator seeking to increase prices. Lastly, Hall contends that he sold "economically" this day because he "consistently and repeatedly purchased fixed price natural gas for less than he sold it." *Id.* at 172.

[253] *Id.* at 174-75.

[254] *Id.* at 175.

[255] *Id.* at 176-77. Hall argues that using regional books that combine physical and financial products is consistent with general market practices and avoids the problem of discerning where a trade should be placed if it has risks associated with both products. Hall also claims that OE Staff attempts to place responsibility for the change in how the

b. OE Staff's Position

112. OE Staff denies that it seeks to hold Tran and Hall individually liable on a theory of vicarious liability or that it relies solely on Wilson's testimony to prove Tran's and Hall's manipulative conduct and intent. Rather, OE Staff maintains that Tran's liability is established by her own conduct, including that she executed the majority of the physical fixed-price trades at the Relevant Locations, fine-tuned the spreadsheets that OE Staff maintains were used to disguise the scheme, and encouraged Wilson to make specific bidweek trades in furtherance of the scheme. Although conceding that Wilson's testimony is not direct evidence of Tran's intent, OE Staff argues that Wilson's testimony does provide support for inferring Tran's intent, along with additional evidence in the trade data, Callender's testimony, and the findings of TGPNA's Compliance Department and Risk Control Office. Lastly, OE Staff argues that the fact of Wilson's "candidly acknowledging that he could not testify to Tran's state of mind" supports rather than undermines his credibility.[256]

113. OE Staff argues that Hall's liability is not premised just on his selling fixed-price physical gas in a single point-month but upon his role in "devising, leading, and participating in the manipulative scheme,"[257] including making trades that established the benefiting positions.[258] OE Staff also disagrees with Hall's contention that his fixed-price physical trades in the January 2011 bidweek at SoCal were not manipulative. OE Staff contends that Hall's arguments at most, establish a factual dispute as to conduct and scienter that must be resolved at a hearing.[259]

West Desk's books were kept on him when, in fact, the decision was made by TGPNA's management in consultation with a number of managers in addition to Hall. *Id.*

[256] Staff Reply at 78-79. For example, OE Staff states that Wilson's testimony explained the linkage between "the initial positions and benefiting positions, as well as the relationship between fixed price trades and the NYMEX." OE Staff argues that Wilson understood that Tran was too shrewd to say explicitly that the desk was manipulating the index. *Id.*

[257] *Id.* at 80.

[258] *Id.* at 80-81.

[259] OE Staff also maintains that Hall's argument that his participation in the restructuring of TGPNA's books (that commingled its physical and financial positions) is not evidence of his intent to participate in the scheme is not a threshold legal issue ready for determination at this time. Similarly, although OE Staff defends Wilson's testimony

c. Commission's Determination

114. Tran's and Hall's arguments that OE Staff's case is based on vicarious liability for the actions of Wilson and other indirect theories of liability reflect a misreading of the Staff Report. As reiterated in the Staff Reply, OE Staff asserts that Tran and Hall each personally engaged in significant acts in furtherance of the alleged scheme. These allegations create issues of fact which must be resolved through the hearing process. Tran's and Hall's claims that there is insufficient evidence of scienter to require a hearing also fail because they reflect a disagreement over Wilson's credibility as well as the existence and import of other facts. Issues of credibility and the weight of evidence are best vetted and resolved by an ALJ through the hearing process.[260] Accordingly, we set this issue for hearing.

V. Procedural Issues

115. Respondents contend that this proceeding should be terminated in whole or in part for various procedural reasons. They contend that the proceeding should be terminated because: (1) the Order to Show Cause failed to provide sufficient notice of Respondents' conduct which OE Staff seeks to penalize, and (2) most of the violations are barred by the five-year statute of limitations set forth in 18 U.S.C § 2462. Respondents contend that, if the Commission does not terminate this proceeding, the issue of whether they have violated NGA section 4A and the Anti-Manipulation Rule must be adjudicated in a federal district court, rather than in a hearing before a Commission ALJ. In support of this contention, Respondents argue: (1) NGA section 24 gives federal district courts exclusive jurisdiction over violations of the NGA, (2) the Commission's ALJs have not been appointed consistent with the Appointments Clause of the United States Constitution, and (3) the Commission's *ex parte* rule violates the Administrative

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about how Hall described the scheme, OE Staff also argues that the proper forum to prove that Wilson is credible is at a hearing. *Id.* at 82.

[260] *Nw. Cent. Pipeline Corp.*, 46 FERC ¶ 61,325, at 61,981 (1989) ("The ALJ is in the best position to judge the credibility of witnesses on this issue."); *Brown v. Barnhart*, 298 F. Supp. 2d 773, 778 (E.D. Wisc. 2004) ("it is the ALJ who has the duty to weigh the evidence, resolve material conflicts, make independent findings of fact and determine the case accordingly."). The same is true of Hall's arguments about the purpose and intent of, and responsibility for, the commingling of the physical and financial positions in TGNPA's books and his claim that his trading during the January 2011 SoCal bidweek was not manipulative.

Procedure Act (APA).[261] For the reasons discussed below, the Commission rejects all of these contentions.

A. Notice under Due Process, NGA Section 22, and Commission Rule 209(b)

116. In seeking summary disposition of this matter, Respondents point to certain alleged deficiencies in the notice required to be provided to them under the due process clause of the Constitution and under NGA section 22.[262] Respondents also point to what they contend is OE Staff's failure to meet the required pleading standard under the Commission's Rules of Practice and Procedure.[263]

1. Sufficiency of Notice Pursuant to Due Process and NGA Section 22

a. Respondents' Position

117. Respondents allege that the Order to Show Cause violates the due process clause of the Constitution and the notice requirements of NGA section 22. Respondents claim that because OE Staff has indicated that it will call expert witnesses at trial to "conduct their own analyses and draw their own conclusions on the number of point-months and the harm and disgorgement calculations," OE Staff is "attempting to somehow reserve unto itself the right to change the allegations from those contained in the Order to Show Cause, and have Respondents respond to a potentially different case."[264] Respondents allege that this raises the possibility that OE Staff will "spring[] potentially substantial new allegations" on Respondents in a way that prevents Respondents from adequately preparing for and responding to what they claim may be an "ambush of new allegations."[265] Respondents further argue that the Order to Show Cause provides inadequate notice because it "fail[s] completely to identify any alleged fraudulent activity in 33 out of 38 allegation bidweeks."[266] As a result, respondents seek a new

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[261] Answer at 158 (citing 5 U.S.C. § 554(d)).

[262] *Id.* at 125-28 (citing U.S. Const. amend. V; 15 U.S.C. § 717t-1).

[263] *Id.* at 128-31.

[264] *Id.* at 127.

[265] *Id*.

[266] *Id*. at 125-26.

Order to Show Cause to avoid "disrupt[ing] [the] orderly process by springing potentially substantial new allegations."[267]

b. OE Staff's Position

118. In response, OE Staff asserts that the Order to Show Cause provides ample notice by "describ[ing] with specificity the trading scheme" by which Respondents intended to "move index prices to benefit TGPNA's Print Risk positions."[268]

119. OE Staff avers that this description is amplified both by the five point-months described in detail in the Order to Show Cause, which provide an "illustration of the scheme" as well as by the narrative description of the scheme set forth in Wilson's and Callender's testimony.[269] Furthermore, OE Staff states that the identified manipulative behavior is not limited to the 38 point-months it identifies in the Order to Show Cause.[270] Those point-months were identified, says OE Staff, for the "purpose[] of reasonably (and conservatively) estimating market harm and disgorgement."[271] And it is, at least in part, on the market harm and disgorgement point that OE Staff will "adduce testimony from experts who will have conducted their own independent analyses of the number of point-months and the harm and disgorgement calculations."[272] OE Staff affirms that it will "not be presenting Respondents with a different case or different theory of the alleged manipulative scheme."[273] Instead, OE Staff states that, "any change in the number of point-months for purposes of determining penalties, market harm, and disgorgement would not result in an alleged manipulative scheme different than the scheme OE Staff has described in the Staff Report."[274] Accordingly, the anticipated expert testimony is "not an attempt by OE Staff to reserve the authority to present Respondents with a 'potentially different case' or to present 'different theories' about the alleged

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[267] *Id.* at 126.

[268] Staff Reply at 44-45.

[269] *Id.* at 45.

[270] *Id.* at 46.

[271] *Id.*

[272] *Id.* at 47.

[273] *Id.* at 48.

[274] *Id.*

manipulation."[275] Furthermore, OE Staff notes that Respondents would "receive pre-filed expert testimony prior to a hearing and have the opportunity to submit responsive testimony."[276]

c. Commission's Determination

i. NGA Section 22(b)

120. NGA section 22(b) provides that "[t]he penalty shall be assessed by the Commission after notice and opportunity for public hearing."[277] The Commission's 2006 Statement of Administrative Policy Regarding The Process For Assessing Civil Penalties (2006 Policy Statement) explains:

> Before issuing an order assessing a civil penalty against any person under the NGA, the Commission will issue such person notice of the proposed penalty and a statement of the material facts constituting the violation. The notice will give the person the opportunity to respond, including information to show why the penalty should either not be assessed or be modified or reduced.[278]

121. Respondents offer neither argument nor case law indicating that NGA section 22(b) requires anything other than that which the 2006 Policy Statement plainly articulates is required: (1) notice of the proposed penalty and (2) a statement of the material facts constituting the violation. We find that the Order to Show Cause and Staff Report exceed these requirements, detailing the proposed penalty and the reasons for it, and providing an extensive statement of material facts, which includes a description of the allegedly manipulative behavior (dates, locations, traders, physical and financial products involved and how they were allegedly manipulated by the traders to their own benefit); an explanation of why OE Staff believes the trading violated the Anti-Manipulation Rule; an explanation of why OE Staff believes the trading is inconsistent with legitimate trading; and witness statements that OE Staff asserts corroborate and inform their analysis. Therefore, we find no violation of NGA section 22(b) and deny

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[275] *Id.* at 47.

[276] *Id.*

[277] 15 U.S.C. § 717t-1.

[278] *Process For Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006) (2006 Policy Statement).

summary judgment on this ground. Accordingly, we do not find the need to set this issue for hearing.

ii. Constitutional Due Process

122. The Parties agree that the due process protections of the Fifth Amendment of the Constitution apply to cases such as this, which involve the imposition of civil penalties by an administrative agency.[279] The Supreme Court has made clear that "[t]he essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it."[280] Notice is required not as an end in itself, but to allow a respondent "an effective opportunity to defend" at a subsequent hearing.[281] Accordingly, notice "must be granted at a meaningful time and in a meaningful manner,"[282] so that it can "reasonably apprise any interested person of the issues involved in the proceeding."[283] Notice does not require that every single instance upon which agency action is based be articulated.[284] Rather, notice has been determined constitutionally *inadequate* where an agency provides no practical way for an adverse party to know the nature of the proceeding against it.[285]

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[279] *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60 (1999) (noting that "the first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in property or liberty.") (internal citations omitted).

[280] *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) (internal citations omitted); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("[t]he core of [due process] is the right to notice and meaningful opportunity to be heard.").

[281] *See Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

[282] *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 (1972).

[283] *N. Ala. Exp., Inc. v. United States*, 585 F.2d 783, 787 (5th Cir. 1978).

[284] *Ryan v. Ill. Dept. of Children and Family Servs.*, 185 F.3d 751, 761 (7th Cir. 1999) (notice of pretermination hearing given to state agency employees was not insufficient, for procedural due process purposes, by failing to catalog all the reasons for employees' termination given that the notice detailed many charges that were used to terminate them).

[285] *See*, *e.g.*, *Morgan v. United States*, 304 U.S. 1, 19 (1938) (where the then Bureau of Animal Industry agency conducted a "sweeping investigation [with] thousands of pages of testimony . . . bearing upon all phases of the broad subject of the conduct of the market agencies;" provided no a "statement or summary of its contentions and []

123. We find that the Order to Show Cause and Staff Report fully satisfy the requirements of constitutional due process. The description of the trading behavior in the Staff Report provides detailed notice that allows Respondents to effectively defend against the allegations.[286] The Staff Report identified the relevant traders, trading desk, physical and financial products and the locations and time periods during which they were traded, and the alleged manipulative scheme in which those traders, during those times, at those locations, traded with the goal of moving index prices to benefit Print Risk positions.[287] That the Staff Report further details five of those point-months as an "illustration," and focuses on 38 of those point-months for "purposes of reasonably (and conservatively) estimating market harm and disgorgement" does not *diminish* the adequacy of the notice, but makes it more robust.[288] In making this determination, we are mindful that it is Respondents who made the trades at issue, are privy to all the circumstances and motivations for their trades, and are therefore best and uniquely able to defend against the clearly articulated charges that the trades were manipulative.[289]

124. Respondents cite *Hess & Clark Div. of Rhodia, Inc. v. FDA*,[290] for the proposition that due process must be sufficient to allow "the affected party to prepare an informed

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proposed findings;" made only vague, general, and oral allegations in proceedings against a particular company; then issued an binding order.)

[286] *See* Staff Report, section III (The West Desk's Bidweek Trading Scheme); section IV (Legal Analysis); and section V (Remedies and Sanctions).

[287] *Id*.

[288] Staff Reply at 46, Staff Report at section V.

[289] In determining the adequacy of notice, it is appropriate to take into account the context of the case and the sophistication of the parties. *See Mullane v. Central Hanover Bank and Trust Co*., 339 U.S. 306, 314, (1950) (holding that the adequacy of notice is to be determined with "due regard for the practicalities and peculiarities of the case"); *see Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599 (D.C. Cir. 1993) (noting that "it is axiomatic that we evaluate the adequacy of process in light to the 'capacities and circumstances of those who are to be heard.'" (citing *Goldberg v. Kelly*, 397 U.S. at 268-69); and finding that because the respondent was an experienced air carrier operating in a regulated environment it was "presumably familiar" with the facts underlying the agency's action and therefore "could be expected to have sufficient know-how to separate the wheat from the chaff.")

[290] 495 F.2d 975 (D.C. Cir. 1974).

response which places all the relevant data before the agency."[291] There are a number of problems with reliance on this authority. First, *Hess* construed the adequacy of statutory notice under the Food and Drug Act, not the constitutional due process and notice at issue here. Second, *Hess* required "all the relevant data" in a wholly different context than ours: whether notice was sufficient to allow respondents to address the allegations *without a hearing*.[292] Here, of course, the question is whether the notice is sufficient to allow Respondents' to respond to the Order to Show Cause and to defend themselves in a proceeding in which a hearing will be conducted. We find the Order to Show Cause and Staff Report more than adequately do so.

125. That OE Staff expects to adduce additional evidence of this scheme in the form of expert testimony if the matter is set for hearing also does not defeat the sufficiency of the Order to Show Cause's notice. Certainly, if that expert testimony were to describe a different scheme—by different traders, at different times and different locations, with a different purpose—concerns over notice could be raised before the ALJ, and the ALJ may take actions to ensure that Respondents' rights to due process are protected. Accordingly, that experts may provide additional evidence of the scheme for which ample notice has been given does not defeat the effectiveness of such notice.

126. For these reasons, we find that the Order to Show Cause and Staff Report readily comport with the requirements of constitutional due process. Thus, we do not find the need to set this issue for hearing.

2. Sufficiency of Notice under Commission Rule 209(b)

a. Respondents' Position

127. Respondents allege that OE Staff was required to meet the pleading standards of Rule 206, governing "complaints,"[293] rather than the standards of Rule 209, governing

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[291] Answer at 126.

[292] *Hess & Clark Div. of Rhodia, Inc. v. FDA*, 495 F.2d 975, 984 ("if the Commissioner of FDA is relying on his Notice as a device for invoking a summary judgment procedure that avoids the statute's general requirement of a hearing he must include in such notice references to the 'facts' that he deems to be established in order that there may be meaningful opportunity to controvert the alleged facts and present a material issue for hearing.").

[293] Rule 206 sets forth 11 categories of information particular to a complaint that must be provided in a complaint. Respondents point to the rule's requirement that complaints "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements," and "[e]xplain how the action or inaction

"orders to show cause,"[294] and that the Order to Show Cause and Staff Report fail to meet that burden.[295] Respondents maintain that the Commission was wrong when it recently rejected the same argument in *BP*.[296] Respondents claim that the Commission's holding in *BP* was at odds with the Commission's prior statement in Order No. 670, and that the *BP* holding failed to adequately address the contradiction.[297] Respondents also argue, in the alternative, that should the Commission maintain that Rule 209 governs, the Order to Show Cause and Staff Report fail to meet Rule 209's pleading requirements.[298]

128. Respondents ask the Commission to find that the Order to Show Cause and Staff Report did not "clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements" or provide an "explanation of how the action or inaction violates applicable statutory standards or regulatory requirements," as is required of complaints in Rule 206.[299] Alternatively, Respondents ask that the Commission find that the Order to Show Cause and Staff Report are deficient, under the standard for orders to show cause articulated in Rule 209, for failing to "contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting."[300] Specifically, Respondents take issue with the level of detail concerning "33 of 38 bidweeks," which they argue was so scant that the Order to Show Cause fails to allege the "theory of manipulation for each month" or provide any "factual allegations or analysis of the

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violates applicable statutory standards or regulatory requirements." 18 C.F.R. § 385.206 (2020).

[294] Rule 209 provides, "Contents. A notice of examination or an order to show cause will contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting. The statement is tentative and sets forth issues to be considered by the Commission." 18 C.F.R. § 385.209 (2020).

[295] Answer at 128-31.

[296] *Id.* at 128 (citing *BP Am.*, 156 FERC ¶ 61,031 at P 16).

[297] *Id.* at 128 n.494.

[298] *Id.* at 130.

[299] *Id.* at 129 (citing 18 C.F.R. § 385.206(b)(1), (b)(8)).

[300] *Id.* at 130 (citing 18 C.F.R. § 385.209(b)).

trading."[301] Respondents argue that the charts submitted as Appendices to the Staff Report do not assist in meeting the pleading requirements because appendix A only identifies the location and month at issue, and appendix B consists of what Respondents call mere "bubble charts . . . that by themselves do not constitute even a tentative statement of Enforcement Staff's allegations."[302] For the five bidweeks discussed in detail in the Staff Report, Respondents allege that it fails to identify the specific trades constituting the violation.[303] Finally, Respondents argue, because OE Staff has reserved the right to adduce expert witnesses (which Respondents say amounts to "chang[ing] its theory of the case as the proceeding develops"), the Order to Show Cause's notice is by definition incomplete.[304]

b. OE Staff's Position

129. OE Staff contends that Rule 209, and not Rule 206, applies to orders to show cause.[305] OE Staff relies on the Commission's recent pronouncement in *BP*, in which it stated "pursuant to our rules, Rule 209 provides the relevant standards . . . for an order to show cause."[306] The Commission's decision was well-founded, says OE Staff, as Rule 206 "by its terms, applies only to 'complaints.'"[307] Further, it applies only to complaints filed by "persons," which by definition excludes the Commission, argues OE Staff.[308] OE Staff underscores that Order No. 670 applied Rule 206 to complaints, not orders to show cause.[309] Accordingly, orders to show cause are required to contain "a statement of the matters about which the Commission is inquiring, and a statement of the authority

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[301] *Id.* at 129-30.

[302] *Id.* at 130.

[303] *Id.* at 129.

[304] *Id.* at 131.

[305] Staff Reply at 49-51.

[306] *Id.* at 50 (quoting *BP Am.*, 147 FERC ¶ 61,130 at P 16).

[307] *Id.* at 49.

[308] *Id.* at 49-50 & n.178 (citing Rule 102(d) which defines "person" to exclude the Commission. 18 C.F.R. § 385.102(d) (2016) ("'Person means . . . any agency, authority or instrumentality of the United States (other than the Commission) . . . .").

[309] *Id.* at 50, n.179.

under which the Commission is acting. The statement is tentative and sets forth the issues to be considered by the Commission."[310]

130. OE Staff argues that the Order to Show Cause and Staff Report in this case meet this standard by "setting forth specifically the alleged manipulative scheme carried out by TGPNA's West Desk during the Relevant Period, describing the trading tactics used to move index prices to benefit Print Risk positions during the months when the West Desk Executed the scheme . . . [and] contain[ing] 'a statement of authority under which the Commission is acting,'" as required.[311]

c. Commission's Determination

131. We affirm that Rule 209 sets forth the pleading requirements for orders to show cause, and we find that the Order to Show Cause and Staff Report meet that standard.

132. The Commission's precedent makes clear that Rule 209 applies to orders to show cause, and that Rule 206 applies to complaints. Commission precedent does not support Respondents' insistence that we apply the rules specifically crafted for complaints filed by private parties, to functionally distinct orders to show cause initiated by Commission Staff. Rule 206 and Rule 209 were promulgated in a 1983 reorganization of the Commission's Rules of Practice and Procedure.[312] From the inception, it has been clear that Rule 209 relates to orders to show cause, the pleading that "initiat[es] a proceeding [by the Commission] against a person . . . due to suspected non-compliance with [a] statute or a Commission rule or order."[313] Likewise, Rule 206 has "deal[t] with complaints,"[314] the pleading that "a person may file [] against any other person alleged to be in contravention or violation of any statute, rule, order or other law administered by the Commission, or for any other alleged wrong over which the Commission may have

[310] *Id.* at 50 (citing 18 C.F.R. 385.209(b)).

[311] *Id.* at 50-51.

[312] *Revision of Rules of Practice and Procedure to Expedite Trial-Type Hearings*, Order No. 225, FERC Stats. & Regs. ¶ 30,358 (1982) (cross referenced at 19 FERC ¶ 61,069) (noting that many of the rules and practices largely existed prior to passage of the 1983 rule, which streamlined and reorganized the rules).

[313] Order No. 225, FERC Stats & Regs. ¶ 30,358.

[314] *Id.*

jurisdiction."[315] Rule 206 and 209 have since been continuously applied accordingly.[316] Unsurprisingly, then, the Commission recently rejected the request that Rule 206 be changed to apply to orders to show cause, finding in *BP* that "pursuant to our rules, Rule 209 provides the relevant standards . . . for an order to show cause."[317]

133. We reject Respondents' contention that the Commission's holding in *BP* is a "change in position from" the view expressed in Order No. 670.[318] Respondents attempt to ascribe a prior inconsistency to the Commission, based on its statement in Order No. 670 that Rule 206 "governs a complaint alleging manipulation."[319] Certainly, Order No. 670 stated that pleadings alleging market manipulation must conform to Rule 206.[320] However, the type of pleading at issue was a complaint filed by a third party, not an order to show cause initiated by the Commission[321] and the Commission was responding to commenters who had expressed concern that complaints alleging market manipulation filed by private parties would be used as "exploratory litigation," or otherwise abused to the unfair detriment of the subject of the complaint, particularly in light of the then-nascent rules on market manipulation.[322] Commenters suggested steering those complaints to the Office of Enforcement, so that allegations of market manipulation would not be publicly aired by complaint prior to a determination of initial validity by the Commission.[323] In addition, commenters suggested the adoption of additional procedural safeguards.[324] The Commission declined to make such changes, holding that additional procedures for complaints would be "unnecessary" because "the requirements for filing complaints are set out in Rule 206, and the process for handling complaints . . . is well-

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[315] 18 C.F.R. § 206(a).

[316] *See*, *e.g.*, *FERC Practice and Procedure Manual*, Rule 206 and Rule 209.

[317] *BP Am.*, 147 FERC ¶ 61,130 at P 16.

[318] Answer at 128, n.494.

[319] *Id*.

[320] Order No. 670,114 FERC ¶ 61,047.

[321] *Id.*

[322] *Cinergy Initial Comments of Cinergy Servs., Inc*, Docket No. RM06-06, at 7 (filed Nov. 17, 2005).

[323] *Id.* at 10.

[324] *See, e.g., id*., at 10-13.

defined through Commission case law. There is no need for a special or separate set of procedures for complaints arising from our new anti-manipulation authority."[325] Thus, the Commission's proclamation in Order No. 670, while certainly bearing on claims of market manipulation, dealt only with such claims made in complaints by parties other than the Commission.

134. We find that the Order to Show Cause and Staff Report meet the pleading requirements set forth in Rule 209. Orders to show cause must include "a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting. The statement is tentative and sets forth the issues to be considered by the Commission."[326] As described above, the Staff Report describes the nature of the scheme with particularity. This level of detail and particularity is far more than the required "statement of the matters about which the Commission is inquiring," mandated by Rule 209. As such, we do not find the need to set this issue for hearing.

3. Fair Notice

a. Respondents' Position

135. Respondents argue that the Commission must reject OE Staff's assertion that a fraudulent scheme can exist as part of trading "with *some* legitimate, economic motive," because they were not given fair notice that such trading could be found fraudulent.[327] According to Respondents, OE Staff is attempting to expand the definition of fraud beyond its traditional scope. The Respondents assert that the courts have held that, when a trade with a legitimate purpose would have taken place despite any additional manipulative purpose, the trade cannot be found to "'artificially' affect[] the price of the [commodity] or inject[] inaccurate information into the market, which is the principal concern about manipulative conduct."[328] Given this precedent, the Respondents assert that a party could not know with any reasonable certainty that the Commission might find that trades animated by a legitimate motive may be fraudulent. However, the Respondents assert that, contrary to this precedent, OE Staff rejects the principle that manipulative intent must be the "but for" cause of the relevant transaction. The

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[325] Order No. 670, 114 FERC ¶ 61,047 at P 70.

[326] Staff Reply at 50 (citing 18 C.F.R. § 385.209(b)).

[327] Answer at 139.

[328] *Id.* at 141 (quoting *SEC v. Masri*, 523 F. Supp. 2d at 373).

Respondents contend that, if the Commission accepts OE Staff's reasoning, it would deprive the Respondents of fair notice in violation of the Due Process Clause.

b. OE Staff's Position

136. OE Staff contends that the Commission should reject the Respondents' arguments regarding fair notice of what constitutes fraudulent trading for two reasons. First, OE Staff states that they are based on a fact in material dispute (i.e., whether or not the West Desk had a legitimate motive for their bidweek trading scheme). Second, OE Staff asserts that Respondents' arguments misstate the applicable Commission precedent and that a "manipulative purpose, even if mixed with some non-manipulative purpose, satisfies the scienter requirement."[329] OE Staff further contends that Respondents had not only constructive, but actual notice of the broad scope of NGA section 4A and the Anti-Manipulation Rule.[330] OE Staff points to the recent district court decision in *Silkman I*, which rejected a similar fair notice argument made in a FERC enforcement proceeding.[331] OE Staff explains that the court in *Silkman I* held that the "void for vagueness doctrine"[332] is applied more leniently in the sphere of economic regulation of sophisticated parties, and where there is a process for parties "to obtain an official government answer . . . before they engage in potentially unlawful conduct."[333]

c. Commission's Determination

137. We reject Respondents' contention that they lacked fair notice. As OE Staff points out, in *Barclays Bank,* the Commission explicitly rejected the argument that OE Staff is required to disprove all possible non-manipulative purposes with which a

[329] *Barclays Bank*, 144 FERC ¶ 61,041 at P 70.

[330] *See* Staff Reply at 62 n.220 (citing TGPNA F 00709392 (Sept. 24, 2009 email from Gary Craven to a TGPNA distribution list regarding ETP's $30 million settlement with the Commission); Craven Test. Ex. 3 (May 14, 2009 email between Craven and Hall regarding a federal lawsuit against ETP alleging manipulation of NYMEX prices)).

[331] *Silkman I*, 177 F. Supp. 3d at 702-06.

[332] The void for vagueness doctrine is simply a corollary of the fair notice requirement as applied to regulated entities. The doctrine addresses at least two discrete due process concerns: first, regulated parties should know what is required of them so they may act accordingly, and second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 240-41 (2012).

[333] Staff Reply at 62 (quoting *Silkman I*, 177 F. Supp. 3d at 702-03).

manipulative purpose may have been commingled.[334] Indeed, the Commission has stated explicitly that "[t]he Anti-Manipulation Rule requires manipulative intent; it does not require exclusively manipulative intent."[335]

138. A case cited by Respondents is instructive. In *General Electric Co v. EPA*, the court explained that a regulation being enforced must meet the "fair notice requirement" such that "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform."[336] However, in the same sentence, the court noted that parties are expected to acquire notice "by reviewing the regulations and other public statements issued by the agency."[337]

139. Indeed, the Commission stated publicly, when it issued its Anti-Manipulation Rule, that it construed fraud broadly.[338] The Commission specifically rejected arguments that the rule was vague or overbroad.[339] Moreover, the Commission and courts have repeatedly found the Anti-Manipulation Rule to be written broadly to encompass the full and wide variety of fraudulent activity that can occur.[340] As such, Respondents' claim that they lacked fair notice is without merit.

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[334] *Barclays Bank PLC*, 144 FERC ¶ 61,041 at P 70.

[335] *Id.*

[336] 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citing *Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Com'n*, 528 F.2d 645, at 649 (5th Cir. 1976)).

[337] *Id*.

[338] Order No. 670, 114 FERC ¶ 61047 at PP 16-25.

[339] *Id*. PP 30-32.

[340] *Houlian Chen*, 151 FERC ¶ 61,179, at P 116 (2015) (Order Assessing Civil Penalties). *See also City Power Mktg*, 199 F. Supp. 3d at 238 ("The Anti-Manipulation Rule gave clear notice that fraudulent schemes of all sorts were prohibited."); *Silkman I*, 177 F. Supp. 3d at 706 ("[T]he relevant statute prohibits 'fraud' in connection with a jurisdictional transaction. Although it is perhaps true that this regulation does not provide a precise delineation of where the outer boundaries of prohibited conduct lays, that is not the test it must meet. [The party charged with manipulation] knew or should have known that its conduct was proscribed").]

140. As a separate basis for rejecting the Respondents' contention that they did not have fair notice, we adopt the rationale relied on in the recent district court decision in *Silkman I*, in which the court reasoned that the "void for vagueness doctrine" is applied more leniently in the sphere of economic regulation of sophisticated parties, and where there is a process for parties "to obtain an official government answer . . . before they engage in potentially unlawful conduct."[341] Respondents, as sophisticated parties dealing in a sphere of economic regulation, cannot allege that they were blindsided by the possibility that manipulative conduct, be it pervasive or partial, could be adequate to justify enforcement measures pursuant to NGA section 4A. Moreover, the evidence presented by OE Staff, indicating that Respondents had actual notice of at least one case involving manipulation of monthly index prices,[342] weighs strongly against Respondents' claim that they lacked notice.

141. We reject Respondents' contention that they did not receive fair notice in accordance with the Due Process Clause. As such, we do not find the need to set the fair notice issue for hearing.

B. Statute of Limitations

142. OE Staff and Respondents agree that the five-year statute of limitations set forth in section 2462 applies to the Commission's actions to assess civil penalties for violations of the prohibition on market manipulation in NGA section 4A. As relevant here, section 2462 provides that "an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." The Parties are in accord that the claims "first accrued" in June 2009 and continued through June 2012, when OE Staff alleges that Respondents engaged in market manipulation. However, the Parties' positions depart on: (1) whether the Commission's issuance of an order to show cause commencing the Commission's formal penalty process under the NGA stops the running of the statute of limitations, and (2) whether certain tolling agreements between the Parties validly delayed the running of the statute of limitations.

[341] *Silkman I*, 177 F. Supp. 3d at 702-03 (citing *Zhen Zhou Wu v. Yufeng Wei*, 711 F.3d 1 at 15 (1st Cir. 2013) (*Core Labs*)).

[342] Staff Reply at 28.

1. Commencement of an NGA "Proceeding" under Section 2462

a. Respondents' Position

143. Relying on *United States v. Core Laboratories*,[343] Respondents contend that section 2462 requires the Commission to file an action in federal district court to collect a penalty within five years of the conduct to be penalized. Respondents contend that the Commission's current administrative process is not subject to a separate five-year statute of limitations that can be satisfied by the Commission's issuance of the Order to Show Cause on April 28, 2016,[344] nor did the issuance of the Commission's Order to Show Cause "toll the five-year statute of limitations."[345]

b. OE Staff's Position

144. Citing *3M Co. (Minn. Mining & Mfg.) v. Browner*,[346] OE Staff argues that the Order to Show Cause began an adversarial adjudicative process at the Commission which qualifies as the commencement of a "proceeding" under section 2462.[347] OE Staff also relies on *Silkman I*,[348] which held that the Commission's administrative process under the FPA (which also begins with an order to show cause), contains "the basic elements common to adversarial adjudication,"[349] and therefore, stops the running of the five-year statute of limitations.

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[343] Answer at 133-134 (citing *Core Labs*, 759 F.2d 480, 482 (5th Cir. 1985)).

[344] Answer at 131-34.

[345] *Id.* at 132.

[346] 17 F.3d 1453, 1455-57 (D.C. Cir. 1994) (*3M*).

[347] Staff cites additional authorities for the proposition that an enforcement action initiated by an order to show cause under the Commission's regulations qualifies as a "proceeding." *See* Rule 209(a)(2) (stating that "[t]he Commission may initiate a *proceeding* against a person by issuing an order to show cause."); *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134, 141 (D.C. Cir. 1994) (noting that "FERC's order initiating *administrative proceedings* is not a definitive ruling or regulation" in the context of an interlocutory appeal).

[348] 177 F. Supp. 3d at 698-701.

[349] *Id.* (citing *FERC v. Barclays Bank*, 105 F. Supp. 3d at 1133).

c. Commission's Determination

145. Section 2462 requires that an agency commence a "proceeding" for the enforcement of a penalty within five years from "the date when the claim first accrued." The issue in this case is whether the Order to Show Cause commenced a "proceeding" within the meaning of section 2462 for purposes of satisfying the five-year statute of limitations. Under Rule 209(a)(2), an order to show cause "initiate[s] a proceeding against a person."[350] Treating the first step in an administrative agency's adjudicative process as commencing a "proceeding" for purposes of section 2462 is in accord with federal case law on this issue, whether that action is labeled an "order to show cause," an "administrative complaint,"[351] a "charging letter,"[352] or another agency-specific nomenclature.[353]

146. Although this proceeding was initiated under the NGA and Part 385 of the Commission's Rules of Practice and Procedure, recent decisions under the Federal Power Act (FPA) have held that, when the Commission issues an order to show cause initiating the administrative process, that process constitutes a "proceeding" under section 2462. [354]

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[350] 18 C.F.R. § 385.209(a)(2). *See also Enforcement of Statutes, Regulations and Orders,* 123 FERC ¶ 61,156, at P 27 (2008) ("an Order to Show Cause commences a Part 385 proceeding."). In contrast, during the investigatory phase, which precedes a Part 385 proceeding, "[t]here are no parties, as that term is used in adjudicative proceedings … and no person may intervene or participate as a matter of right in any investigation under this part." 18 C.F.R. § 1b.11(2020). The APA, 5 U.S.C. § 554(b), which governs many agency adjudications of civil penalties, also refers to agency adjudications as "proceedings." *See also* U.S. Judicial Code, 28 U.S.C. §§ 2344(1), 2347; 31 U.S.C. § 3730(e)(3) (referring to "administrative civil money penalty proceedings" before an agency).

[351] *3M,* 17 F.3d at 1455.

[352] *See United States v. Meyer*, 808 F.2d 912, 913, 919 (1st Cir. 1987) (*Meyer*); *United States v. Serfilco, Ltd.,* 1998 WL 641367 at 1 (N.D. Ill, Sept. 11, 1998) (*Serfilco*).

[353] *See also United States v. Worldwide Indus. Enters., Inc.*, 220 F. Supp. 3d 335, 336 (E.D. N.Y. 2106) (at the FCC, the initiating document is called a "Notice of Apparent Liability for Forfeiture"); *In re Donohoo*, 243 B.R. 139, 140 (Bankr. M.D. Fl. 1999) (*Donohoo*) ("[T]he FDIC instituted a proceeding against the Debtor and others pursuant to a Notice of Assessment of Civil Money," which was followed by an adversarial administrative hearing.).

[354] *See FERC v. Powhatan Energy Fund*, *LLC*, 949 F.3d 891 (4th Cir. 2020); *FERC v. Silkman* (*Silkman II*), 359 F. Supp. 3d 66 (D. Me. 2019) (finding that the

For example, in *FERC v. Powhatan Energy Fund* (*Powhatan*), the Fourth Circuit considered the process under FPA section 31(d)(3), which applies when a respondent elects to proceed to district court for *de novo* review rather than have a hearing before an ALJ.[355] Relying on *3M Co.*, the Fourth Circuit began its analysis by observing that "[t]here is no question that, after issuance of the OSC, if a party elects [an ALJ hearing], then a § 2462 'proceeding' . . . must take place."[356] It then reasoned that even the less-formal FPA section 31(d)(3) process – which does not provide for an ALJ hearing, discovery, or cross-examining opposing witnesses – constitutes a "proceeding" for purposes of section 2462 because it "share[s] many crucial similarities" with "formal judicial or administrative adjudication."[357] Among the similarities are that: (i) "the FERC Commissioners act as neutral decisionmakers, while FERC Enforcement staff present the factual and legal bases supporting imposition of a civil penalty"; (ii) upon issuance of the order to show cause, FERC's ex-parte communications rule applies; and (iii) each side "submit[s] formal briefing and relevant documentary evidence to FERC, which then determines whether to impose civil penalties" by applying law to fact.[358] This reasoning applies all the more strongly in the NGA context, given its more formal processes.

147. In *3M*, which the *Powhatan* court relied on, the EPA filed an administrative complaint against the company, but civil penalties could only be assessed "by an order made on the record after opportunity for a hearing."[359] The D.C. Circuit held that the filing of the administrative complaint began a "proceeding" for purposes of section 2462, because the agency's penalty process "emulate[d] judicial proceedings: a complaint is brought, the defendant answers, motions and affidavits are filed, depositions are taken, other discovery pursued, a hearing is held, evidence is introduced, findings are rendered

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Commission's penalty assessment process prior to *de novo* district court review was sufficiently adversarial to qualify as a "proceeding" under section 2462), *Silkman I*, 177 F. Supp. 3d at 700 (same).

[355] In the absence of a respondent's election of *de novo* review, an FPA case would follow the same process as an NGA case, including an ALJ hearing should there be factual issues to resolve. *See* 16 U.S.C. § 823b(d)(2).

[356] *Id.* (citing *3M Co.*, 17 F.3d at 1455-59, 1462).

[357] *Powhatan*, 949 F.3d at 902.

[358] *Id.* (citing 18 C.F.R. §§ 385.2201, 2202).

[359] *3M,* 17 F.3d at 1455.

and an order assessing a civil penalty is issued."[360] Similarly, in *Meyer*, the First Circuit held that section 2462's statute of limitations was met because the administrative proceedings, initiated by a "charging letter," were brought within five years of the alleged violation.[361] Here, the April 28, 2016 Order to Show Cause began the Commission's formal administrative penalty process, which, by this Order, will provide Respondents with an on-the-record hearing before an ALJ, and which, under the Commission's regulations, shall include the typical elements of adversarial adjudication including discovery, the right to take depositions and submit testimony, and the ability to cross-examine opposing witnesses.[362] That process constitutes a "proceeding" for the reasons set forth in *3M* and *Meyer*.

148. We also find *Core Labs* inapposite because that case addressed the meaning of a different term in section 2462. In deciding whether the government's claims were time barred, the Fifth Circuit stated that "[t]he issue for decision is the meaning of 'the date when the claim first *accrued*.'"[363] In this case, OE Staff does not disagree that the claims "accrued" when the alleged violations occurred (not on the date of a final administrative order assessing the penalty as the government argued in *Core Labs*). Rather, the issue presented here is whether initiation of the Commission's administrative penalty process qualifies as a "proceeding" for purposes of section 2462. The majority of federal courts that have addressed this question, such as *3M* and *Meyer,* hold that the initiation of an adversarial administrative penalty process with a hearing before an ALJ begins a qualifying "proceeding" under section 2462.[364] Therefore, Respondents' reliance on *Core Labs* for the proposition that section 2462's limitations period is not "tolled" during

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[360] *Id.* at 1456.

[361] *Meyer*, 808 F.2d at 914. *Meyer* involved a violation of the Export Administration Act. *See* 50 U.S.C. §§ 2401-2420.

[362] *See generally* 18 C.F.R. § 385.402-509 (2020).

[363] *Core Labs,* 759 F.2d at 481 (emphasis added).

[364] *3M,* 17 F.3d at 1456; *Meyer*, 808 F.2d at 914 (finding that it is reasonable that "any administrative action aimed at imposing a civil penalty must be brought within five years of the alleged violation."); *see also United States v. Sacks,* No. C10-534RAJ, 2011 WL 6883740 at *3 (W.D. Wash., Dec. 28, 2011) ("The statute requires the Government to commence administrative proceedings to assess an administrative penalty within five years of the defendant's underlying conduct."); *Worldwide Indus.,* 220 F. Supp. 3d at 339-41 (holding that the plain language of section 2462 yields a single reasonable reading; that initiation of an administrative penalty process suffices, disputing the need to look further into that process to determine if it is sufficiently "adjudicatory").

an administrative proceeding is irrelevant. The Order to Show Cause commenced a proceeding that meets the requirements of section 2462, therefore there is no need to "toll" the clock in anticipation of some future qualifying event. Once section 2462's initiation of a "proceeding" requirement has been met, the statute of limitations clock simply stops ticking.

149. We also conclude Respondents' invocation of *Core Labs* is premature. *Core Labs* concerned whether the government gets a *second five-year period* under section 2462 in which to bring a collection suit *after* the conclusion of a timely-commenced administrative penalty process. In *Core Labs*, the Commerce Department initiated its administrative penalty process within five years and ultimately levied a fine. Only when the government filed a federal court action to collect the penalty did the respondent interpose a statute of limitations defense. Core Labs prevailed because the Fifth Circuit measured the "accrual" of the *claim to collect the penalty* back to the underlying violation of the statute, not the date of the final administrative order that concluded the administrative proceeding. Here, the Order to Show Cause merely began the Commission's penalty process, which has not concluded, resulted in a fine, or led to a second, civil action to collect. Therefore, Respondents have prematurely sought to invoke *Core Labs* to bar this timely-commenced administrative penalty proceeding.[365]

150. Holding that the administrative penalty process and the collection suit must be completed within five years is not just unrealistic, but as the Fourth Circuit recognized, it would, "in effect, put a suspected violator in control of the enforcement timeline,"[366] and as the First Circuit noted, it would give suspected violators "considerable incentive to employ the available procedures to work delay – not a particularly difficult task in view of the marked resemblance between the conduct of modern administrative litigation and

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[365] That a collection action will be brought in this case is not a foregone conclusion. Should Respondents prevail at the hearing, or on an appeal of an adverse finding by the ALJ to the Commission or a court of appeals, there would be no penalty to collect. In addition, in the event of an adverse hearing order, Respondents could simply choose to pay the penalty rather than defend the civil collection action, or conversely, the government might choose to forego a collection action. Thus, although Respondents attempt to portray this matter as a single government enforcement action that "proceeds in stages," Answer at 134. *Meyer* and the other cases that reject *Core Labs* recognize that the administrative penalty proceeding, and a later civil action to collect, are separate and distinct "proceedings" triggered by accrual of distinct claims at different times. The administrative proceeding adjudicates the alleged violations, and the second, civil collection action is only necessary should a penalty result and the Respondents refuse to pay, and accrues only when the administrative penalty is final. *Meyer*, 808 F.2d at 922.

[366] *Powhatan*, 949 F.3d at 900.

King Minos's labyrinth in ancient Crete."[367] We also agree with the observations of the D.C. Circuit that "it strikes us as implausible that Congress intended to endow private litigants with so powerful an incentive for procrastination,"[368] and with the Eighth Circuit that "[a] violator should not be able to escape paying a penalty by dragging his feet through the administrative penalty-assessment process."[369] On the other hand, requiring the Commission to formally begin its administrative penalty process within five years of the alleged conduct is fully consistent with the policies underlying section 2462 – to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[370]

151. Respondents have demonstrated no basis for a claim of unfair surprise. OE Staff notified Respondents of the existence of a non-public investigation on July 20, 2012, approximately a month after the last bid-week of the alleged scheme. Moreover, that investigation involved substantial quantities of data and documents from Respondents and third parties and sworn testimony from a number of witnesses, including current and former employees of the corporate Respondents. And, as discussed further below, the Order to Show Cause commencing this proceeding was issued within the time frame provided by the statute of limitations as modified by the Parties' tolling agreements. As a consequence, Respondents have articulated no actual concerns in their Answer regarding "repose, fair notice, and preservation of evidence" in this matter.[371]

152. Accordingly, based on all of the above, we conclude that the Order to Show Cause commenced an adversarial, adjudicative process that constitutes a "proceeding" for purposes of the section 2462 statute of limitations. As such, we do not find the need to set this issue for hearing.

2. Validity of Tolling Agreement

153. Under the preceding analysis, conduct that occurred more than five years before the issuance of the Order to Show Cause; *i.e.,* prior to April 27, 2011, would be time-barred under section 2462. However, the Parties executed three tolling agreements

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[367] *Meyer*, 808 F.2d at 919.

[368] *Id.* at 920.

[369] *Godbout-Bandal*, 232 F.3d at 640.

[370] *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (quoting *Order of R.R. Tels. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)).

[371] *Meyer*, 808 F.2d at 922.

during the investigation, which if valid, operated to suspend the statute of limitations for TGPNA and the other Respondents for significant periods of time during the pendency of the investigation.[372]

a. Respondents' Position

154. Respondents contend that the tolling agreements should be voided because "Enforcement Staff induced Respondents to enter into those agreements by withholding material facts that were essential to the terms of the agreements."[373] For all three agreements, Respondents assert that OE Staff fraudulently induced their consent by withholding the information about the two "whistleblower" witnesses. For example, TGPNA claims that it only entered the first agreement because it assumed that OE Staff would contemporaneously disclose all "material allegations against TGPNA".[374] Under the second tolling agreement, in exchange for tolling the statute of limitations for an additional six months, all five Respondents received an additional 87 days to respond to OE Staff's preliminary findings letter during the investigation.[375] Nevertheless, Respondents claim that this additional response time was of no value because, by withholding the fact that two of OE Staff's witnesses were "whistleblowers,"

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[372] The first tolling agreement, dated September 10, 2013, initially was for six months and was signed only by TGPNA; it was designed to permit TGPNA to produce documents in response to *subpoenas duces tecum*. That agreement was extended by six months on December 17, 2013, such that the tolling period ran from September 10, 2013 through September 10, 2014. The second tolling agreement, dated March 2, 2015, included all five Respondents and covered the period between March 2, 2015 and September 5, 2015. It was signed in exchange for OE Staff's agreement to extend Respondents' deadline to respond to OE Staff's preliminary findings letter of February 10, 2015. The third tolling agreement, dated September 25, 2015, was signed by TGPNA, Tran, and Hall, and was intended to facilitate settlement discussions. That agreement initially covered an indeterminate period but was terminated by Respondents on January 27, 2016. *See generally*, 14 Bus. & Com. Litig. Fed. Cts. § 153:5 (4th ed.) (discussing circumstances under which parties might seek to enter into a tolling agreement, whereby they agree to extend an applicable statute of limitations and noting that any tolling agreement should clearly set forth the rights and remedies being preserved and the period for which the applicable statutes of limitation are being tolled).

[373] Answer at 135.

[374] *Id.* at 136.

[375] Initially, Respondents were given 30 days to respond to OE Staff's preliminary findings. An additional 87 days to respond was a substantial extension of time.

Respondents contend that they were prevented from addressing the "primary evidence against them – the credibility of Wilson's and Callender's allegations."[376]

155. The justification for the third tolling agreement was to enable the Parties to engage in settlement discussions. However, Respondents TGPNA, Tran, and Hall seek rescission of the third tolling agreement on the grounds that OE Staff negotiated in bad faith because it "affirmatively misrepresented its intention regarding whether it would recommend that the Commission institute an enforcement action against the perceived 'deep pockets' of Total and TGPL."[377] Respondents point to no actual affirmative misrepresentation but instead assert that the misrepresentation is inferable from the fact that Total and TGPL were not included in the Notice of Alleged Violations (NAV), dated September 21, 2015, or the third tolling agreement, dated September 24, 2015, but were included in the section 1b.19 letter, dated November 25, 2015, which was served less than a week after the only settlement conference in the case.[378]

b. OE Staff's Position

156. OE Staff states that Respondents did not and could not have reasonably relied on the tolling agreements to require OE Staff to make the disclosures Respondents now claim were material to their decisions to enter each of the tolling agreements. First, federal law prohibits the disclosure of the identity of witnesses as Commodity Futures Trading Commission (CFTC) whistleblowers "unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding."[379] This did not occur in this case until the issuance of the Order to Show Cause. OE Staff contends that sophisticated parties such as Respondents should be deemed to have been aware of this constraint on OE Staff's authority to disclose the whistleblowers' identities. Second, OE Staff maintains that Respondents offer no evidence that they in fact relied on the alleged omissions about the whistleblowers. There is no language in the agreements requiring OE Staff to make any evidentiary disclosures and Respondents' Answer "did not include any evidence to support such a proposition."[380]

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[376] *Id.* at 137.

[377] *Id.* at 138.

[378] *Id.* at 138-39.

[379] 7 U.S.C. § 26(h)(2). OE Staff faults Respondents for not citing any legal authority for the proposition that the failure to disclose that a government witness is a whistleblower constitutes fraud or bad-faith negotiations. Staff Reply at 55.

[380] Staff Reply at 57.

157. Third, OE Staff maintains that Respondents bargained for and received valid consideration in each of the tolling agreements. Finally, for the third tolling agreement, OE Staff maintains Respondents' purported inferences are unfounded but cautions that to fully explain why Respondents' arguments are frivolous would require OE Staff to disclose privileged settlement communications.[381] Nevertheless, OE Staff maintains that bad faith cannot be deduced simply from the fact that some respondents, but not others, were included in the NAV and the third tolling agreement versus the section 1b.19 letter, or that the section 1b.19 letter was served one week after a settlement conference failed to resolve the case.[382]

c. Commission's Determination

158. The tolling agreements were contractual agreements between the Parties and therefore are governed by the law of contracts.[383] Under such principles, none of Respondents' arguments establish the elements required for rescission. In general, rescission requires that a party's assent was "induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying."[384] An omission can qualify as a misrepresentation only if disclosure "would correct a mistake of the other party as to a basic assumption on which that party is making the contract, if non-disclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing."[385]

159. Here, there is no provision in the tolling agreements negotiated by Respondents that either explicitly or implicitly required OE Staff to disclose any evidence, including the whistleblower status of any witnesses, in exchange for the tolling periods. The absence of any provision in the tolling agreements requiring the disclosure of evidence by

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[381] *Id.* at 56. Under the Commission's Rules of Practice and Procedure, settlement discussions are to remain confidential. *See* Rule 606, 18 C.F.R. § 385.606 (2020).

[382] OE Staff points out that future settlement negotiations were not precluded by the issuance of the section 1b.19 letter. Staff Reply at 57.

[383] *In re Commercial Fin. Servs., Inc. v. Temple*, 294 B.R. 164, 169-76 (Bankr. N.D. Ok. 2003).

[384] Restatement of Contracts (Second) § 164; *See also Barrer v. Women's Nat'l Bank*; 761 F.2d 752, 758-59 (D.C. Cir. 1985) (contract can be voided for innocent misrepresentation when maker made an assertion that was not in accord with the facts; was material; was relied upon; justifiably by the recipient in agreeing to the contract).

[385] *Barrer* , 761 F.2d at 758.

OE Staff undercuts Respondents' claim that this was a material issue underlying their assent at the time of the tolling agreements,[386] or that OE Staff was on notice of the issue at all. Moreover, although Respondents make allegations of fraud and concealment, they offer no evidence that they entered into the tolling agreements in actual reliance upon a belief that OE Staff would, in return, affirmatively disclose specific information about its independent witnesses.[387]

160. Nor can Respondents make the necessary showing that OE Staff should have reasonably inferred that such a disclosure was expected. On the contrary, "contracting parties are presumed to know the law and have it in mind when drafting their agreement."[388] Here, federal law prohibited OE Staff from revealing any information

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[386] The cases that Respondents cite in which unsophisticated parties were duped into one-sided agreements based on misrepresentations about central terms of the contract are inapposite. Answer at 135-38; s*ee In re Estate of McKennery*, 953 A.2d 336, 339-40 (D.C. Ct. App. 2008) (plaintiff, who lived in a shelter, pressured into giving up property rights based on false representation that home was about to be demolished); *Greene v. Gibraltar Mortg. Inv. Corp.*, 488 F. Supp. 177, 178-79 (D. D.C. 1980) (under threat of foreclosure, homeowner entered into second deed of trust after defendant misrepresented both the amount of principal on the note and the broker fee); *Amouri*, 20 S.W. 3d at 167 (unsophisticated car buyer duped into leasing rather than purchasing vehicle). In this case, each tolling agreement provided facially meaningful benefits to Respondents and they were negotiated at arms' length with the assistance of experienced counsel.

[387] *See* Answer at PP 134-37 (citing *Amouri v. Sw. Toyota, Inc.*, 20 S.W.3d 165, 171 (Ct. App. Tex. 2000) (*Amouri*)). In *Amouri*, the plaintiff submitted evidence in support of his claim for fraudulent inducement, in the form of an affidavit. In their Answer, Respondents make no evidentiary proffer nor do they request a hearing on this issue. Arguments unsupported by any evidence can be deemed waived. *Barclays Bank*, 144 FERC ¶ 61,041 at P 13.

[388] *Hoff v. Sander*, 497 S.W.2d 651, 652 (Mo. Ct of Appeals 1973) (citations omitted) (plaintiff charged with constructive knowledge of zoning laws prohibiting intended use of the property despite assurances of the seller to contrary). *See also Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n.*, 499 U.S. 117, 130 (1991) (quoting *Farmer & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923) (existing law at the making of a contract "enter into and form a part of it, as fully and if they had been expressly referred to or incorporated into its terms")); *Greene*, 488 F. Supp. at 179 ("A contract is void for fraud or misrepresentation where a party makes assertions not in accord with the facts regarding essential terms of the proposed contract, *reasonably* inducing apparent assent by one who neither knew or had reasonable opportunity to know what those essential terms were.") (emphasis added); *Bradford v. B&P Wrecking Co., Inc.*, 171 Ohio App.3d 616, 632 (Ohio Ct. App. 2007)

prior to the Order to Show Cause, that could lead to the disclosure of the identities of Wilson and Callender as CFTC whistleblowers.[389] Therefore, it would have been unreasonable as a matter of law for Respondents to have expected OE Staff to violate the law and reveal this information without a court order.[390]

161. With regard to the second tolling agreement, Respondents claim that OE Staff wrongly withheld "the fact that the primary witnesses that it sought to rely on were whistleblowers and that it viewed them as credible *because* they were whistleblowers."[391] By this time, however, Respondents had been provided the identities of both Wilson and Callender (although not the fact that they were registered as CFTC whistleblowers, which disclosure was prohibited by law) in the Preliminary Findings Letter which also provided

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(citations omitted) ("Because appellant is involved in real estate transactions and rental properties, knowledge of the law government land installation contracts can be imputed to him); *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 63 P.2d at 131-32 (purchaser charged with constructive knowledge of correct square footage and legal description of property); *Frey v. Trenor Motor Co.*, No. 94-CA-69, 1995 WL 502254 at P *8 (Ohio Ct. App., Aug. 25, 1995) (in rescission case, experienced car dealer "can reasonably be imputed with knowledge" of the laws governing odometers).

[389] Staff Reply at 55 (citing Staff Report at 12 n.54). *See also* Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 U.S.C. § 26(h)((A) & (C)(i)(II). Respondents had experienced counsel who presumably knew about the statutory protections for CFTC whistleblowers and who were also familiar with the confidential nature of OE Staff's investigations, including that OE Staff regularly makes document and data requests and takes testimony from third parties without notice to the entities under investigation. *See* Penalty Guidelines, 132 FERC ¶ 61,216; *The FERC Enforcement Process*, 35 Energy L.J. 283, 291 (2014).

[390] *Cf. Detroit Housing Corp. v. United States*, 55 Fed. Cl. 410, 411 (2003) (Misrepresentation occurs when the government "fails to disclose information it had a duty to disclose.").

[391] Answer at 137. Respondents say they were deprived of the opportunity to attack the credibility of Wilson and Callender based on the fact that they might financially benefit from successful civil enforcement actions by the CTFC and the Commission. But OE Staff knew that the witnesses were CTFC whistleblowers and was therefore in a position to weigh their potential self-interest as well as determine whether other evidence and testimony sufficiently corroborated their accounts. Moreover, as we explain above, Respondents will have the ability to attack the credibility of these witnesses in the appropriate forum of an ALJ hearing.

a summary of their investigative testimony.[392] Under these circumstances, it is not reasonable that the additional fact that these two witnesses had registered as CFTC whistleblowers would have been material to Respondents' decision to enter the second tolling agreement. Rather, Respondents entered this agreement because they desired, sought, and received an additional 87 days to submit their response the Preliminary Findings Letter.[393]

162. The third tolling agreement is also not subject to rescission. While Respondents claim that OE Staff "affirmatively misrepresented" whether it would recommend an enforcement action against Total and TGPL, no evidence of any affirmative misrepresentation has been proffered.[394] We will not infer fraudulent inducement based solely upon the fact that Total and TGPL were not named in the NAV and the third tolling agreement, but were included in the section 1b.19 Letter that was served a week after the failed settlement conference. Nor can Respondents demonstrate reasonable reliance here because they were on notice as early as the Preliminary Finding Letter that OE Staff believed that TGPNA, TGPL and Total "each bore direct responsibility for allowing the scheme to happen."[395] Moreover, OE Staff is correct that the section 1b.19 Letter did not preclude further settlement negotiations, which had the potential to result in a settlement that might—or might not—have included Total and TGPL. Settlements can occur at any time, including after the issuance of an order to show cause.[396] While

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[392] Among other facts, Respondents had been informed that Callender was an eyewitness to the scheme, had worked under Tran's supervision, and had admitted to participating in the scheme. Preliminary Findings Letter at 4.

[393] *See Jackson v. Teamsters Local Union* 922, 204 F. Supp. 3d 97, 107-08 (D. D.C. 2016) ("A fact is material if its existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction.…").

[394] Answer at 138.

[395] Preliminary Findings Letter at 3.

[396] *See, e.g., ETRACOM LLC and Michael Rosenberg*, 163 FERC ¶ 61,022 (2018) (Order Approving Stipulation and Consent Agreement) (FERC approved settlement after the Order Assessing Civil Penalties and the initiation of a federal district court proceeding); *Barclays Bank PLC,* 161 FERC ¶ 61,147 (2017) (Order Approving Stipulation and Consent Agreement) (Commission approved the settlement after the Order Assessing Civil Penalties and the initiation of a federal district court proceeding); *Deutsche Bank Energy Trading*, 142 FERC ¶ 61,056 (Order Approving Stipulation and Consent Agreement) (Commission approved the settlement after the Order to Show Cause).

Respondents may now regret their decisions to enter into the tolling agreements, they did so at arms' length, without time pressure, and with advice of experienced counsel.[397]

163. For all of the reasons set forth above, we find that the three tolling agreements are valid. Accordingly, the statute of limitations does not prevent claims against Respondents for conduct occurring as far back as the following dates: TGPNA– June 15, 2009, Tran and Hall – June 17, 2010, and Total and TGPL–December 23, 2010. Any claim that accrued before those dates for each Respondent is barred by the statute of limitations. For these reasons, we do not find the need to set this issue for hearing.

C. Challenges to the Administrative Adjudication Process

164. Respondents contend that, if the Commission does not terminate this proceeding, the issue of whether they have violated NGA section 4A and the Anti-Manipulation Rule must be adjudicated in a federal district court, rather than in a hearing before a Commission ALJ. Respondents assert that federal district courts have exclusive jurisdiction to determine violations under the NGA, pursuant to the statutory language in NGA section 24.[398] They also assert that adjudicating this proceeding before an ALJ, rather than in federal district court, "would raise a multitude of constitutional problems," including under the Appointments Clause and the Fifth and Seventh Amendments to the U.S. Constitution.[399] They also argue that the Commission *ex parte* rule violates the APA.[400] We address those arguments in turn, explaining why none of those provisions precludes the Commission from setting this proceeding for hearing before an ALJ.

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[397] *See Jackson*, 204 F. Supp. 3d at 115 (rather than having been misled by defendants, court described plaintiffs as seemingly having a "classic case of buyer's remorse," but dissatisfaction with a contract is not grounds for rescission). Because we resolve this issue based upon the arguments of the Parties, there is no need to disclose the confidential settlement discussions.

[398] Answer at 144-45.

[399] *Id.* at 149 (quoting *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005)).

[400] *Id.* at 156-59.

1. Whether NGA Section 24 Requires this Case to be Brought in Federal District Court

a. Respondents' Position

165. Respondents assert that the Commission lacks statutory authority to make legally binding determinations of NGA violations.[401] Rather, they contend that NGA section 24 vests the federal district courts with "exclusive jurisdiction of violations of this chapter."[402] Therefore, Respondents argue that while the NGA's civil penalty provision, section 22,[403] permits the Commission to hold a "hearing" to "assess a proposed penalty," in order to give legal effect to such a proposed penalty, the Commission must bring an action in federal district court for "a *de novo* determination whether Respondents violated

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[401] *Id.* at 144-45.

[402] *Id*. at 149 (citing 15 U.S.C. § 717u). NGA section 24, 15 U.S.C. § 717u, states in pertinent part:

> The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found.

[403] NGA section 22, 15 U.S.C. § 717t-1, provides:

(a) Any person that violates this Act, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as the violation continues.
(b) The penalty shall be assessed by the Commission after notice and opportunity for public hearing.
(c) In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

the NGA and whether a penalty is warranted."[404] Respondents also cite case law for the proposition that the federal district courts are presumed to have the authority to adjudicate civil penalties unless that authority "is in express terms placed exclusively elsewhere," and that nothing in the NGA expressly grants the Commission jurisdiction to conduct an administrative adjudication "to determine a *violation*."[405] Furthermore, Respondents dispute OE Staff's contention that the intent of the "exclusive jurisdiction" language in NGA section 24 was to preclude state court jurisdiction over NGA claims. Therefore, Respondents argue that if the Commission takes any role in adjudicating a penalty under the NGA, it must necessarily share jurisdiction with the federal district courts, which conflicts with the word "exclusive" in NGA section 24.[406]

166. Respondents claim support for their reading of NGA section 24 in the sections of the FPA and the Natural Gas Policy Act of 1978 (NGPA) that give the federal district courts jurisdiction over a variety of civil and criminal violations and injunctions; preserving what Respondents claim is the "traditional role" of the federal courts in enforcing the Commission's core statutes.[407] Respondents juxtapose these provisions with a small number of "carve-out" sections of the FPA that expressly grant the Commission jurisdiction to adjudicate certain violations and impose penalties through an administrative process.[408] Respondents find import in that the amendments to the NGA made by the Energy Policy Act of 2005 ("EPAct 2005"),[409] which added NGA section 22's civil penalty authority, contained no similar express civil penalty "carve-out" provision. Thus, Respondents contend that NGA section 22 only permits the Commission to "*assess*" a penalty that the Commission has "*proposed,*" while preserving the district courts' express authority to adjudicate violations under NGA section 24.[410]

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[404] Answer at 145.

[405] *Id.* (quoting *Lees v. United States*, 150 U.S. 476, 478-79 (1893)).

[406] *Id.* at 148.

[407] *Id.* at 145-46, 146 n.551 (citing, *inter alia*, 15 U.S.C. § 3414(c) (NGPA criminal penalties); 15 U.S.C. § 3414(b)(6)(F) (NGPA civil penalties); 15 U.S.C. § 3414(b)(1) (NGPA injunctive relief); 16 U.S.C. § 825o (FPA criminal penalties); 16 U.S.C. § 823b(d)(3)(B) (civil penalties); 16 U.S.C.§ 825m(a) (injunctive relief)).

[408] *Id*. at 146.

[409] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

[410] Answer at 146-47.

167. Respondents additionally point to the fact that before the Commission may "assess" a civil penalty, both NGA section 22(c) and FPA section 31(c) require the Commission to first give Respondents "notice and opportunity for public hearing."[411] Under FPA section 31(d) the Commission may conduct an administrative hearing to impose a civil penalty only if the accused, not the Commission, elects an ALJ hearing "in lieu of the default district court hearing."[412] According to Respondents, this results in district court *de novo* adjudication of FPA civil penalty claims "in the vast majority of cases."[413] Respondents therefore argue that the Commission may only "assess" an NGA civil penalty through an administrative process when Congress explicitly so provides – such as in FPA section 31(d)(2). Because NGA section 22 contains no similar express authorization, Respondents again conclude that Congress did not intend to so empower the Commission.[414]

168. Respondents also postulate that Congress could not have intended to authorize the Commission to issue multi-million dollar civil penalties based on the "*informal* agency procedures" contemplated by the Commission in its policy statement for assessing civil penalties.[415] Here, Respondents contrast NGA section 22's language, which requires that a "penalty shall be assessed by the Commission after notice and opportunity for public hearing," with provisions of the FPA that require a hearing to conform to the requirements of the APA,[416] and the Securities Exchange Act that requires the SEC to make findings "*on the record* after notice and opportunity for hearing."[417]

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[411] *Id*. at 148.

[412] *Id*. at 147 n.557. *See* FPA sections 31(d)(2) and (3), 16 U.S.C. §§ 823b(d)(2) and (3).

[413] Answer at 147.

[414] *Id.* at 146-47. Respondents' final textual argument is that NGA section 24's grant of jurisdiction to the federal district courts cannot be limited to the collection actions and injunctions referenced later on in section 24 because that would allegedly render the NGA language "exclusive jurisdiction of violations" superfluous. *Id.* at 148-49. *Cf. Energy Transfer Partners, L.P.,* 121 FERC ¶ 61,282, at P 58 (2007).

[415] Answer at 147 (citing 2006 Policy Statement*,* 117 FERC ¶ 61,317 at P 7 n.26).

[416] 5 U.S.C. § 554.

[417] Answer at 147-48.

b. OE Staff's Position

169. OE Staff disputes Respondents' claim that NGA section 24 gives the federal district courts exclusive jurisdiction to determine liability in NGA penalty matters.[418] Rather, OE Staff asserts that the settled purpose of NGA section 24 in this context is to provide an "avenue" for the Commission to enforce its final judgments if an entity refuses to comply.[419] OE Staff finds support for its interpretation of NGA section 24 in numerous instances in which the Commission used its administrative process to find a "violation" of a section of the NGA and that the courts affirmed these Commission orders.[420] OE Staff also relies on an opinion from the Southern District of Texas in an unsuccessful collateral suit brought by Respondents to enjoin this proceeding, which held that federal district court involvement in Commission matters has "always been 'narrowly tailored to assisting FERC in the performance of its functions.'"[421] Again quoting from this opinion, OE Staff argues that there is "no indication in EPAct 2005 that Congress intended in 2005 to alter the Commission's role as primary fact finder and reserve to the district court an oversight and reviewer role."[422] Thus, OE Staff argues that both before and after EPAct 2005, NGA section 19(b) is the exclusive avenue for subjects seeking judicial review of the Commission's decisions in the Court of Appeals.[423]

170. OE Staff dismisses Respondents' arguments based on certain sections of the NGPA and FPA, arguing that these provisions are not part of the NGA.[424] Moreover, OE

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[418] Staff Reply at 83-84.

[419] *Id.* at 84.

[420] *See e.g., Transcon. Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313 (5th Cir. 1993); *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (5th Cir. 1986) (remanding in part); *Cox v. FERC*, 581 F.2d 449 (5th Cir. 1978).

[421] Staff Reply at 83 (quoting *Total Gas & Power N. Am.*, No. 4:16-cv-1250, 2016 WL 3855865, *14 (S.D. Tex., Jul. 15, 2016)).

[422] *Id.* at 84 (quoting *Total Gas & Power N. Am.*, 2016 WL 3855865 at *16).

[423] *Id.* at 83-84; *see* 15 U.S.C. § 717r(b).

[424] *Id.* at 84. Respondents cite to three sections of the NGPA. Answer at 146 n.551. The first references the criminal penalties for "knowing and willful" violations of the NGPA and the second states that, like under the NGA, injunctions under the NGPA must be brought in the district court. *See* 15 U.S.C. § 3414 (b)(1) (criminal matters); 15 U.S.C. § 3414(b)(1) (injunctions). The third section cited is the NGPA's civil penalty section, 15 U.S.C. § 3414(b)(6)(F), which provides for *de novo* review of a Commission

Staff contends that Respondents employ flawed logic, incorrectly seeking to "interpret the absence of an explicit district court role in the NGA as expressing congressional intent that *all* NGA actions must be adjudicated in district court."[425] OE Staff adds that if Respondents were correct, all NGA matters, including ratemaking, would be adjudicated in a patchwork fashion across the federal court system, clearly in contravention of Congress' intent to establish "uniform federal regulation" under the NGA.[426] OE Staff maintains that the plain language of the NGA and other indicia of Congressional intent establish that the Commission should be the fact finder of NGA violations, and the district court *de novo* review provisions that are explicitly provided for in the statutory language in the NGPA and FPA do not establish a default rule for violations of the Commission's other enabling statutes.[427]

c. Commission's Determination

171. We find that the statutory scheme of the NGA as a whole makes clear that it is for the Commission to assess a civil penalty after notice and an opportunity for a hearing before an ALJ. Under the NGA, a party aggrieved by a Commission order may seek rehearing of that Commission order and then seek review of such order in the court of appeals of the United States for the appropriate circuit.[428]

172. We do not find Respondents' claim that the phrase in NGA section 24 – "the District Courts … shall have exclusive jurisdiction of violations of this chapter" – deprives the Commission of the power to adjudicate violations and assess penalties to be persuasive, because Respondents read this excerpt of section 24 in isolation, without considering its statutory and historical context. We find that, read in conjunction, all of

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assessed penalty in a federal district court. Unlike under the FPA, which provides for an ALJ proceeding at the Commission unless the respondent opts out, the NGPA's district court *de novo* review is automatic. Respondents do not rely on these NGPA sections to assert any specific arguments and do not cite any Commission or federal cases under the NGPA. Presumably for that reason, OE Staff's briefing does not separately address these NGPA sections.

[425] Staff Reply at 84.

[426] *Id.* at 85 (citing *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 389 (2015); *N. Rat. Gas. Co. v. State Corp. Comm'n of Kansas*, 373 U.S. 84, 91 (1963) (the NGA's objective was "to achieve the uniformity of regulation.")).

[427] *Id.*

[428] *Total Gas & Power N. Am.*, 2016 WL 3855865 at *11.

the pertinent sections of the NGA–including the rest of section 24– reflect Congress's intent to establish a delineated regulatory regime that delegates to the Commission the power to adjudicate NGA violations, provides for review of such Commission determinations in the federal Courts of Appeals, and gives federal district courts jurisdiction over only discrete causes of action such as criminal violations, suits for injunctive relief, and enforcement of final judgments. Our interpretation of the "exclusive jurisdiction" language of NGA section 24 is buttressed by the evidence that section 24, and similar provisions in other New Deal regulatory statutes, were designed to prevent state court interference, not preclude the very regulatory bodies established by these statutes from determining violations of their enabling legislation.[429]

173. Contrary to Respondents' assertion that "nothing in the NGA" expressly grants the Commission "jurisdiction to conduct an administrative adjudication to determine a *violation*,"[430] NGA section 14–which has co-existed with section 24 in the NGA since 1938–authorizes the Commission to undertake investigations "in order to determine whether any person has *violated* or is about to *violate* any provision of this chapter."[431] NGA sections 15 and 16 further provide that the Commission has the power to hold hearings and make orders to "carry out the provisions of this act."[432] Based on these provisions, the Commission has long adjudicated violations of provisions of the NGA and the federal courts have consistently upheld Commission orders doing so.[433]

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[429] *See infra* PP 177-81.

[430] Answer at 145.

[431] *See* 15 U.S.C. § 717m(a).

[432] *See id.* §§ 717n, 717o. As the Commission stated in 2005, "When we exercise our new civil penalty authority under the NGA . . . we are required to provide 'notice and opportunity for a public hearing'. . . . When we issue civil penalty notices under the NGA, we intend to provide companies with hearing procedures before an administrative law judge." *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 at P 16 (2005); *see also Mesa Petroleum Co. v. FPC*, 441 F2d. 182, 188 (5th Cir. 1971) (construing NGA section 16 as giving the Commission the power to order refunds).

[433] *See Transcon. Gas Pipe Line*, 998 F.2d 1313, 1319, 1324-25 (affirming the Commission's ruling that the company had "violated sections 4(b), 4(d), and 7(c) of the NGA," and upholding an order to refund $48.5 million); *Walker Operating Corp. v. FERC*, 874 F.2d 1320, 1323 (10th Cir. 1989) (holding that "[t]hese administrative orders determined that certain oil well operators had violated federal law by the diversion of natural gas" and that the Commission "had jurisdiction to issue those orders."); *Coastal Oil & Gas*, 782 F.2d 1249 (reviewing Commission order requiring company to refund

174. A reading of section 24 of the NGA that requires district courts to conduct *de novo* review of the Commission's enforcement orders would also render other sections of the NGA meaningless or contradictory. Specifically, NGA section 19 vests review of Commission orders in the Courts of Appeals, not the district courts. NGA section 19(a) requires a party "aggrieved by an order issued by the Commission" to first apply for rehearing.[434] Should the party not prevail on rehearing, NGA section 19(b) directs that review of the Commission order lies in the court of appeals either in the circuit where the company has its principle place of business or in the U.S. Court of Appeals for the District of Columbia.[435] NGA section 19(b) further mandates that the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. Based upon these provisions in NGA section 19, we reject Respondents' attempt to read into the NGA a district court review process for Commission orders employing a *de novo* standard of review of the type nowhere mentioned in the NGA.

175. Respondents' proposed interpretation of NGA section 24 is also undermined by the fact that the NGA provides for certain actions to be directly brought in the district courts, creating an inference that Congress knew how to create district court jurisdiction and affirmatively chose not to assign NGA civil penalty violations there either directly or under a *de novo* review process. For example, NGA section 7(h) authorizes under certain conditions that a "holder of certificate of public convenience" may file for eminent domain in the district court where the property is located.[436] NGA section 20 empowers the Commission, at its discretion, to bring an injunctive action in "the proper district court."[437] NGA section 14(d) authorizes the Commission to seek the assistance of the district courts to enforce its subpoenas.[438] And, as noted above, NGA section 24 itself provides for district court jurisdiction over criminal violations of the NGA, injunctive

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revenue because it had "violated § 7b of the Natural Gas Act."); *In re Miss. River Fuel Corp*., 9 FPC 198, 214 (1950) ("It appears from the record here that these acts by applicant are violations of provisions of section 7 of the Natural Gas Act, as amended.").

[434] 15 U.S.C. § 717r(a). *See also* 18 C.F.R. § 385.713 (2020).

[435] 15 U.S.C. § 717r(b).

[436] 15 U.S.C. § 717f(h).

[437] *Id.* § 717s; 15 U.S.C. § 717u.

[438] 15 U.S.C. § 717m(d).

relief, and "to enforce any liability or duty created by … any rule, regulation or order thereunder."[439]

176. Federal court precedent supports our interpretation of NGA section 24. Because the NGA assigns only limited roles to the district courts, federal court decisions have narrowly circumscribed the district court's authority to review Commission orders under NGA section 24's language, "to enforce any liability or duty created by … any rule, regulation or order thereunder." For example, in *Tenn. Gas Pipeline v. Mass. Bay Transp. Auth.,* the district court described its "role is one of mere enforcement" of a Commission order, and held that it has "no authority to amend or qualify the Commission's order."[440] Similarly, in *Town of Dedham v. FERC*, the district court held that overturning a Commission order "is not within the enforcement authority given to the district courts by [section 24]" because review of Commission orders is placed in the courts of appeals.[441]

177. The Supreme Court's opinion in *Pan Am. Petroleum Corp. v. Superior Court of Del.*,[442] further supports our interpretation of the phrase "exclusive jurisdiction" in NGA section 24. In *Pan Am. Petroleum*, the Court explained that "[e]xclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded."[443] In other words, while federal jurisdiction over NGA matters is exclusive, the district courts only have jurisdiction over suits – such as injunctions and criminal cases – that the NGA specifically directs must be brought in the federal district courts. Based on this reasoning, the district court in *Town of Dedham v. FERC* rejected the petitioner's attempt to invoke section 24 to obtain district court review of a Commission order, holding that section 24 "is simply an enforcement provision, not an open-ended grant of jurisdiction to the district courts."[444] Only this interpretation of

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[439] *Id.* § 717u.

[440] *Tenn. Gas Pipeline v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 110 (D. Mass. 1998).

[441] *Town of Dedham v. FERC,* No. 15-12352-GAO, 2015 WL 4274884 at *2 (D. Mass., Jul. 15, 2015).

[442] 366 U.S. 656 (1961).

[443] *Id.* at 664.

[444] *Town of Dedham*, 2015 WL 4274884 at *4; *See also Panhandle E. Pipe Line Co. v. Utilicorp. United Inc*., 928 F. Supp. 466, 473 (D. Del. 1996) (district court held it could not review plaintiff's claims of error in a Commission order, stating that, "[a]ny alleged infirmity with the FERC's ruling involving the merits or its authority to so rule needs to be passed upon by the D.C. Circuit, not this Court.").

"exclusive jurisdiction" gives independent meaning to the terms "enforce" and "enjoin" in section 24, and reconciles section 24 with the Commission's power to investigate and find violations under sections 14(a) and 19(b), respectively.

178. Our conclusion that Respondents' reading of the "exclusive jurisdiction" clause in NGA section 24 is incorrect is also supported by analogous federal securities case law. In *Wright v. SEC*,[445] the Second Circuit rejected the petitioner's invocation of an identical "exclusive jurisdiction" clause in section 27 of the Securities Exchange Act of 1934 to contest an order that resulted from an SEC administrative proceeding that expelled the petitioner from various stock exchanges. The Second Circuit explained that the "exclusive jurisdiction of violations of this chapter" language in Section 27 could not be read to preclude the SEC from administratively adjudicating sanctions, such as expulsion, authorized elsewhere in the statute.[446] Rather, similar to the NGA cases previously cited, "exclusive jurisdiction" was simply a reference to the criminal or civil proceedings that the statute directed (or permitted) be initiated in a federal court.[447] The Court reached this conclusion under the "most elementary provisions of statutory construction," that one provision of a statute should be interpreted as to be "consistent with other provisions of the statute."[448] The Court reasoned that under the petitioner's interpretation, the provision of the Securities Exchange Act of 1934 which explicitly authorized the SEC to conduct a proceeding to bar a respondent from an exchange, and another which granted exclusive jurisdiction to the Courts of Appeals to review such SEC actions, would be nullified by the petitioner's construction of the statute.[449]

179. Respondents' interpretation of the "exclusive jurisdiction" clause is also in conflict with the evident purpose of NGA section 24 and similar provisions in the other New Deal

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[445] 112 F.2d 89, 95 (2d Cir. 1940).

[446] *Id.* at 91 (citing 15 U.S.C. § 78s(a)(3) which "authorizes the Commission . . . to suspend . . . or expel from a national securities exchange any member thereof whom the Commission finds to have violated any provision of the Act."); *id*. at 95 (interpreting section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa).

[447] *Id.* at 95.

[448] *Id.*

[449] *Id.* The Securities Exchange Act of 1934 also provides for review of commission orders in the courts of appeals. 15 U.S.C. § 78y(a)(1). However, the SEC is also authorized in certain enforcement matters to directly file suit in federal district court. *See id.* § 78u(d)(3)(A).

statutes.[450] These provisions were included to prevent state court interference with these new federal administrative regimes.[451] Such provisions were necessary because "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the law of the United States."[452] However, a grant of "exclusive jurisdiction," combined with review of an agency finding in a federal court of appeals, functions to displace the authority of state courts to either adjudicate claims arising under federal administrative law or entertain actions to review agency actions.[453] Therefore, we reject Respondents' reading of NGA section 24 which attempts to "repurpose NGA § 24 eight decades later to govern the relationship between federal courts and the agency."[454]

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[450] *See, e.g.,* Securities Exchange Act of 1934, 15 U.S.C. § 78aa(a); FPA, 16 U.S.C. § 825p; Connolly Hot Oil Act of 1935, 15 U.S.C. § 715j(c).

[451] *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567-75 (2016) (holding that the "exclusive jurisdiction" provision in Securities Exchange Act (and similar provisions in other New Deal legislation) should be read to preclude state court jurisdiction over suits "arising under" a federal administrative statute.); *Wright,* 112 F.2d at 95 (rejecting an interpretation of a parallel "exclusive jurisdiction" clause in a manner that would prevent the SEC from finding a violation of the Exchange Act); *Total Gas & Power N. Am*., 2016 WL 3855865 at *13 (holding that "the only meaningful application of the phrase 'exclusive jurisdiction' in § 24 and parallel New Deal-era statutes pertaining to other federal agencies has addressed the allocation of authority between state and federal courts.").

[452] *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990).

[453] The legislative history of the Securities Exchange Act of 1934 illustrates this point. Congress debated whether it should "give jurisdiction" over disputes "either to the Federal court or to the State courts of general jurisdiction." 78 Cong. Rec. 8571 (1934). The House ultimately amended the Senate bill to provide "exclusive" federal jurisdiction. 78 Cong. Rec. at 8099. *See* 15 U.S.C. § 78aa(a) (granting district courts "exclusive jurisdiction). In contrast, other administrative statutes provide for concurrent state court jurisdiction. For example, the Securities Act of 1933 grants the district courts non-exclusive jurisdiction because Congress sought to carefully "preserve[] the jurisdiction of State security commissions to regulate transactions within their own borders." H.R. Rep. 73-85, at 10 (1933); *see also* Investment Advisors Act of 1940, 15 U.S.C. § 80b-14. There are also statutes that provide for federal court jurisdiction but omit the word exclusive. *See* International Wheat Agreement Act of 1949, 7 U.S.C. § 1642(e).

[454] *Total Gas & Power N. Am*., No. 4:16-1250, 2016 WL 3855865 at *15. For similar reasons, Respondents' reliance on *Lees*, 150 U.S. 476, 478-79, for the proposition that the federal district courts are presumed to have the authority to adjudicate civil

180. Respondents' additional argument that Congress intended to preserve the "district courts' express authority" to adjudicate violations under NGA section 24 when civil penalty authority was added to NGA section 22 by EPAct 2005, because Congress did not create a "carve out" authorizing Commission adjudication of civil penalty violations, also lacks merit.[455] As discussed below, we interpret Congress's decision not to include any express provision in NGA section 22 for *de novo* district court adjudication of civil penalty violations to indicate Congress's intent that the Commission continue to use its existing administrative procedures to determine violations, with review of those determinations in the courts of appeal.

181. In adopting NGA section 22, Congress tracked some of the preexisting language in FPA section 31(c), authorizing the Commission to assess civil penalties under the FPA. Thus, both NGA section 22 and FPA section 31(c) provide that the:

> penalty shall be assessed by the Commission after notice and opportunity for public hearing.[456] In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation.

However, while Congress tracked FPA section 31(c) in authorizing the Commission to assess civil penalties under the NGA, Congress did not include in NGA section 22 any language corresponding to FPA sections 31(d)(1) through (3), which set forth both a traditional administrative adjudication and the optional *de novo* district court review process. FPA section 31(d)(2) provides for the Commission to "assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5, United States Code, before an

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penalties unless that authority "is in express terms placed exclusively elsewhere" is unpersuasive. First, as noted above, the NGA does expressly grant the Commission the power to adjudicate civil penalty violations in NGA sections 14 and 20. Second, decided in 1893, *Lees* concerned the jurisdiction of a suit to recover a penalty between the district and circuit courts under the judicial system that preceded the Judiciary Act of 1891. The Supreme Court easily found that when the enabling statute was silent, the district court was the correct venue for original jurisdiction for suits to recover a penalty. However, as *Total* held, "*Lees* sheds no light on the allocation of civil penalty authority to administrative agencies a century later." *Total Gas & Power N. Am.*, 2016 WL 3855865 at *15 n.112.

[455] Answer at 146-47.

[456] The preceding quoted language is in subsection (b) of NGA section 22. The quoted language in the next sentence is in subsection (c) of NGA section 22.

administrative law judge," with the accused having the right to appeal the Commission's order to the United States Court of Appeals. Separately, FPA section 31(d)(1) provides that before issuing an order assessing a civil penalty against a person, the Commission shall inform that person of his opportunity to elect "to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment" which provides for *de novo* review before a district court under FPA section 31(d)(3).[457]

182. Thus, a key question in interpreting NGA section 22 is what is the significance of Congress's decision not to include in that section any provisions corresponding to FPA sections 31(d)(1) through (3). We begin with the "cardinal principle of statutory interpretation that dramatic departures from past practices should not be read into statutes without a definitive signal from Congress."[458] Thus, it is reasonable to presume that: (a) Congress was aware of the Commission's longstanding use of administrative procedures, including hearings before ALJs, to adjudicate violations under the pre-EPAct 2005 NGA; and (b) Congress's decision not to specify the use of any other procedures by, for example, adding language corresponding to FPA sections 31(d)(1) through (3), indicates its intent that the Commission continue to use its existing administrative procedures to adjudicate violations prior to the assessment of civil penalties.[459]

183. We also reject Respondents' more specific contention that the use of the word "*assess*" in NGA section 22(b) is insufficient to authorize the Commission to "*adjudicate*" a civil violation. Respondents argue that NGA section 22 only allows the

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[457] Respondents are simply wrong in asserting that the district court path is the "default" in the FPA for civil penalty violations because the FPA *de novo* option requires an affirmative election by the respondent. *See* Answer at 147 n.557. In the absence of that election, as noted above, the FPA provides for an administrative adjudication analogous to the NGA proceeding at issue here. Additional provisions of the FPA also undermine Respondents' claim that a *de novo* district court proceeding is the rule rather than the exception. For example, under FPA section 31(a), violations of a Commission Compliance Order must be resolved through the ALJ administrative process and there is no *de novo* option there at all. *See* 16 U.S.C. § 823(d)(2)(A).

[458] *U.S. House of Representatives v. U.S. Dept. of Commerce*, 11 F. Supp. 2d 76, 101 (D.D.C. 1998).

[459] *See* 16 U.S.C. § 823c(d)(1) and (d)(3); *Silva-Trevino v. Holder*, 742 F.3d 197, 202 (5th Cir. 2014) ("[W]here there exists a longstanding judicial construction, 'Congress is presumed to be aware of the interpretation…and to adopt that interpretation [if] it re-enacts that statute without change'") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); *Total Gas & Power N. Am*., 2016 WL 3855865 at *19 (noting the absence of any reference to NGA section 24 in the text or legislative history of EPAct 2005).

Commission to "assess" a "proposed penalty," which lacks any legally binding force until the Commission brings an action in district court, and the district court determines that a violation has occurred and a penalty is warranted. However, NGA section 22(c) uses phrases "common in civil penalty provisions in other statutes," which "assume that the power to adjudicate inheres in jurisdiction to 'assess.'"[460] In fact, the FPA, a statute upon which Respondents place great reliance elsewhere in their Answer, uses the word "assess" in precisely the same way in FPA section 31(d)(2), authorizing the Commission to determine that a violation has occurred and impose a civil penalty through an administrative process.[461]

184. Similarly, we find no merit in Respondents' contention that NGA section 22(c)'s language–"[i]n determining the amount of the *proposed penalty*"–only allows the Commission to "propose" a penalty which a district court must then review and adjudicate *de novo*. Nowhere does section 22(b) suggest that such a penalty is merely "proposed" unless and until a district court affirms the Commission's judgment. In fact, a multitude of statutes use the phrase "proposed penalty," but Respondents point to none that have been construed to deprive agencies otherwise endowed with the power to adjudicate violations. Rather, these statutes use the phrase "proposed penalty" because these administrative regimes provide due process to parties to challenge a "proposed" penalty before the administrative body "assesses" a final penalty.[462] Similarly, under section 22(c), the Commission proposes a penalty after taking into consideration "the nature and seriousness of the violation and the efforts to remedy the violation." But the penalty is only "assessed" under section 22(b) after "notice and opportunity for public hearing."

185. Certain additional features of EPAct 2005 provide further support for Congressional intent to continue the long history of Commission adjudication of violations, including the civil penalty violations added by EPAct 2005. First, although Congress augmented the district court's injunction authority in market manipulation

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[460] *Total Gas & Power N. Am.*, 2016 WL 3855865 at *15. *See* Federal Deposit Insurance Act, 12 U.S.C. § 1818i (using the terms "violate" and "assess" a penalty in the same way as the NGA).

[461] *See* 16 U.S.C. § 823b(d)(2) (providing "the Commission shall *assess* the penalty, by order, *after a determination of violation has been made* on the record after an opportunity for an agency hearing . . . before an administrative law judge") (emphasis added).

[462] *See* 49 U.S.C. § 114(v)(3)(D)(i)(ii) (person is given "written notice of the proposed penalty" and "the opportunity to request a hearing on the proposed penalty"); *id.* § 46301(d)(5)(A).

cases, it omitted any reference to the district courts in the new civil penalty section.[463] Adding to the district court's authority in one place in EPAct 2005, yet remaining silent in the civil penalty provision, is certainly evidence that Congress did not intend to revoke the Commission's existing NGA adjudicative authority. Second, EPAct 2005 failed to specify how to determine the venue for civil penalty actions in a district court. In contrast, provisions of the pre-EPAct 2005 NGA that direct certain causes of action to the district courts–such as eminent domain, criminal actions, and injunctions–all contain venue provisions.[464] Third, EPAct 2005 also fails to provide any guidance for the district court review that Respondents claim is required by NGA sections 24 and 22. As a result, a district court would not know whether to apply a substantial evidence test, the *de novo* review sought by Respondents, or "deem the Commission's rulings *prima facie* evidence."[465] As the district court in *Total* held, "[t]he absence of specific statutory directives regarding the results of the agency hearing required by NGA section 22 is a fair indication of congressional intent in 2005 to integrate the civil penalty process into the existing FERC administrative procedures with judicial review by a court of appeals."[466] We agree with the *Total* court that Congress did not anticipate district court involvement in the civil penalty process "beyond the task of enforcement."[467]

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[463] *Total Gas & Power N. Am.*, 2016 WL 3855865 at *15.

[464] NGA section 7(h) and 7(u), 15 U.S.C. § 717f(h) & (u). Additionally, *Total* recognized that the FPA and NGPA provisions that provide a role for the district courts, do consider venue, stating that the proceeding should be filed "in the appropriate district court." *Total Gas & Power N. Am.*, 2016 WL 3855865 at *17. *See* NGPA section 504(b)(6)(F); 15 U.S.C. § 3414(b)(6)(F); FPA section 31(d)(3); 16 U.S.C. § 823c(d)(3).

[465] *Total Gas & Power N. Am.*, 2016 WL 3855865 at *18. Nor does EPAct 2005 provide any procedural guidance that would apply to civil penalty proceedings. Again, in contrast, for civil penalty matters that are brought in the district courts, the FPA and NGPA "grant the district courts authority to *review* the facts and the law and to 'enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part'" the Commission's assessment of civil penalties. *Id.* at *17.

[466] *Id.* at *18.

[467] *Id.* at *17. Respondents' more generic argument that the FPA and NGPA reflect that "Congress has consistently vested jurisdiction over 'violations' of these acts in the federal district courts….which have long exercised exclusive jurisdiction of all alleged violations of FERC's cores statutes and all remedies for those violations, whether civil penalties, criminal penalties, or injunctive relief" finds no support in these statutes. Answer at 145-46. As shown above, first the Commission has a long history of adjudicating NGA violations before civil penalties were added to the statute. Even with

186. An interpretation of EPAct 2005 that maintains rather than limits the Commission's administrative adjudicatory process is also consistent with the impetus for this legislation. EPAct 2005 was passed in response to the discovery of widespread manipulative trade practices in the energy markets in the late 1990s and early 2000s.[468] It follows that the enactment of the civil penalty provisions in NGA section 22 was "intended to address the omission of civil penalty authority from FERC's otherwise broad remedial powers to strengthen FERC's regulation of the energy markets that had proven susceptible to abuse."[469] The interposition of a *de novo* district court review would be logically inefficient after a full administrative hearing, and therefore, contrary to an efficient and timely process for addressing the abuses EPAct 2005 was drafted to address.

187. We also reject Respondents' argument that Congress could not have intended to authorize the Commission to issue large civil penalties based solely on what the Respondents characterize as "informal agency procedures through which FERC claims it can adjudicate those penalties."[470] As noted above, we find that the intent of EPAct 2005 was for the Commission to continue to adjudicate NGA violations under its existing administrative process. Respondents point to the Securities Exchange Act of 1934,[471] which calls for a hearing "*on the record* after notice and opportunity to be heard," whereas NGA section 22 requires "notice and opportunity for public hearing." Under the Commission's regulations, a Commission-mandated public hearing is required to be conducted as an "on the record proceeding."[472] Similarly, Respondents point to the FPA's section 31(d)(2)(A)[473] requirement that hearings be pursuant to the APA. It is reasonable to presume that when Congress enacted EPAct 2005, Congress was aware of

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regard to the FPA and NGPA, Respondents overstate and conflate these statutes use of *de novo* review. In fact, the FPA and NGPA use a variety of paths to address violations including Commission adjudication with review in the courts of appeals, direct filing of actions in the district court, and *de novo* review of Commission findings. *See* 15 U.S.C. § 717t-1(b); 15 U.S.C. § 3414(b)(6)(F); 16 U.S.C. § 823b(c).

[468] *Total Gas & Power N. Am.*, 2016 WL 3855865 at *19.

[469] *Id*.

[470] Answer at 147-48.

[471] 15 U.S.C. § 78u-2(a)(10).

[472] *See* 18 C.F.R. §§ 385.505, 385.510 (2020) (providing for a verbatim on-the-record transcript of the hearing).

[473] 16 U.S.C. § 823b(d)(2)(A).

the Commission's existing hearing procedures. Those existing hearing procedures have historically provided the key procedures of APA-styled administrative adversarial hearings at FERC under the NGA. When enacting EPAct 2005, Congress elected to provide the Commission with enhanced penalty authority while at the same time leaving in place the Commission's existing hearing procedures. Thus, Respondents' arguments that Commission proceedings under NGA section 22 would be insufficiently formal to justify its new penalty authority are based on semantic quibbling with no meaningful differences between administrative adjudications held under Commission regulations versus the APA's requirements. For all the foregoing reasons, we hold that the Commission is authorized to administratively adjudicate OE Staff's claims against Respondents, and that relief from an adverse Commission order after a hearing lies in the courts of appeals, not the district courts. Accordingly, we decline to set this issue for hearing.

2. Whether the Appointments Clause Requires this Case to be Brought in Federal District Court

188. The Appointments Clause of the U.S. Constitution provides that the President shall have the power to appoint, with the advice and consent of the Senate,

> Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[474]

189. The Supreme Court acknowledged that "'[a]ny appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by'" the Appointments Clause.[475] However, "lesser functionaries subordinate to officers of the United States," are not subject to the requirements of the Appointments clause.[476]

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[474] U.S. Const. Art. II, § 2, cl. 2.

[475] *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 880 (1991) (*Freytag*) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

[476] *Buckley v. Valeo*, 424 U.S. at 126 n.162 (other findings superseded by statute as stated in *McConnell v. FEC,* 540 U.S. 93 (2003)).

190. In enacting the Department of Energy (DOE) Organization Act,[477] Congress chose to vest the authority to appoint ALJs in the Chairman of the Commission. The Act delegates to the Chairman authority over "the appointment and employment of hearing examiners in accordance with the provisions of Title 5 [of the United States Code]."[478] "Hearing examiners" are now referred to as ALJs.[479]

a. Respondents' Position

191. Respondents assert that Commission ALJs are inferior officers of the United States and, therefore, they must be appointed by the Commission as a whole, rather than only by the Chairman of the Commission. In particular, they argue that Commission ALJs are inferior officers of the United States because their position is "established by law" and involves the exercise of "significant authority pursuant to the laws of the United States."[480] Respondents contend that Commission ALJs exercise the same kind of authority that the Supreme Court found to be "significant" in *Freytag*, when it held that special trial judges appointed by the chief judge of the U.S. Tax Court were inferior officers.[481] Respondents contend that, because Commission ALJs are purportedly inferior officers, Congress can delegate the authority to appoint Commission ALJs only to the President, the courts of law, or the head of an executive department. They argue, however, that only the Commission acting collectively can constitute the head of a

[477] 42 U.S.C. § 7171.

[478] *Id.* § 7171(c); *see also* 18 C.F.R. § 376.105(b)(2020) ("The Chairman is responsible on behalf of the Commission for the executive and administrative operation of the Commission, including functions of the Commission with respect to — (1) The appointment and employment of Administrative Law Judges in accordance with the provisions of Title 5, United States Code"); 18 C.F.R. § 1.101(i)(2020) ("Administrative Law Judge means an officer appointed under section 3105 of title 5 of the United States Code.").

[479] *See Noble v. Comm'r of Soc. Sec.*, 963 F.3d 1317, 1325 n.14 (11th Cir. 2020) (citing *Nash v. Califano*, 613 F.2d 10 (2nd Cir. 1980)).

[480] Answer at 150 (citing *Buckley v. Valeo*, 424 U.S. at 125-26 (per curiam)). *See also id*. (asserting that "office of an ALJ is plainly '"established by Law"'") (quoting *Buckley*, 424 U.S. at 125 and 5 U.S.C. § 3105).

[481] *Id.* (citing *Freytag*, 501 U.S. at 881-82).

department and, therefore, that Commission ALJs appointed by the Chairman alone are appointed in violation of the Appointments Clause.[482]

b. OE Staff's Position

192. OE Staff asserts that Commission ALJs are employees, and not inferior officers, for purposes of the Appointments Clause. OE Staff relies on three factors for distinguishing between employees and inferior officers, outlined by the D.C. Circuit Court of Appeals in *Tucker v. Comm'r of Internal Revenue*: "(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions."[483] Under those factors, Commission ALJs are employees, OE Staff contends, because they do not exercise significant authority, but instead "hold hearings only when designated by the Commission, conduct adjudications according to detailed regulations, and issue only 'initial' decisions that do not become final unless the Commission permits it."[484]

c. Commission's Determination

193. For the reasons discussed below, the Commission finds that its ALJs are "Officers of the United States," subject to the Appointments Clause. However, the Commission finds that its ALJs are validly appointed by the Chairman of the Commission, consistent with the Appointments Clause. Accordingly, the Commission rejects the Respondents' contention that its ALJs lack the authority to preside at a hearing in this proceeding.

194. In *Lucia v. Securities Exchange Commission*, the Court held that ALJs of the SEC are "Officers of the United States," subject to the Appointments Clause.[485] The Court held that, in order to qualify as an officer rather than an employee, an individual must (1) occupy a "continuing" position established by law[486] and (2) "exercise significant authority pursuant to the laws of the United States."[487] The Commission's ALJs satisfy

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[482] *Id*.

[483] *Tucker v. Comm'r of Internal Revenue*, 676 F.3d 1129, 1133 (D.C. Cir. 2012).

[484] Staff Reply at 87.

[485] *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (*Lucia*).

[486] *Id*. at 2051 (citing *United States v. Germaine*, 99 U.S. 508, 511-12 (1879)).

[487] *Id*. (citing *Buckley*, 424 U.S. at 126).

both these prerequisites to be "Officers" for the same reasons the Court found the SEC's ALJs do.

195. The Court found that the SEC's ALJs "hold a continuing office established by law,"[488] because they receive a career appointment "to a position created by statute, down to its 'duties, salary, and means of appointment,'" citing the APA.[489] The DOE Organization Act requires that "the appointment and employment of" the Commission's ALJs be "in accordance with the provisions of Title 5 [of the United States Code]." Thus, the Commission's ALJs receive a career appointment to the same type of position as the SEC's ALJs, subject to the same requirements of Title 5 of the U.S. Code.

196. The Court also found that the SEC's ALJs exercise "significant discretion" when carrying out "important functions."[490] The Court found that the SEC's ALJs take testimony, conduct trials, administer oaths, rule on motions, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. The Commission's ALJ's also take testimony, 18 C.F.R. § 385.504(a)(4) (2020), conduct trials, 18 C.F.R. § 385.504(a)(1), administer oaths, 18 C.F.R. § 385.504(b)(3), rule on motions, 18 C.F.R. § 385.504(b)(8), rule on the admissibility of evidence, 18 C.F.R. § 385.509(b) (2020), and may sanction failure to comply with discovery orders, 18 C.F.R. § 385.411(a)(2)-(4) (2020).

197. The Court also found that the SEC's ALJs issue initial decisions containing factual findings, legal conclusions, and appropriate remedies, which can become final if the SEC chooses not to review them. However, the Court noted that in *Freytag*[491] it held that the issuance of initial decisions by the Tax Court's special trial judges supports a finding that they are Officers, even though those initial decisions cannot become final in a major case until reviewed by a regular tax court judge. The Commission's ALJs issue initial decisions with findings and supporting reasons on any material issue of fact, law, or discretion presented on the record, 18 C.F.R. §§ 385.703, 385.708 (2020). The Commission ALJ's initial decision may become final if no participant files a brief on exceptions, 18 C.F.R. § 385.708(d). The Commission ALJ's thus have at least as much authority with respect to initial decisions as the special trail judges at issue in *Freytag*.

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[488] *Id*. at 2053.

[489] 5 U.S.C. §§ 556-557, 5372, 3105; *Lucia*, 138 S. Ct. at 2051 (quoting *Freytag*, 501 U.S. at 881).

[490] *Lucia*, 138 S. Ct. at 2053.

[491] *Freytag*, 501 U.S. 868.

198. We conclude that the Commission's ALJs are Officers of the United States, subject to the Appointments Clause for the same reasons the Court found the SEC's ALJs are Officers of the United States. However, we find that, unlike the SEC's ALJs, the appointment of the Commission's ALJs is consistent with the Appointments Clause. That clause provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, [. . .] in the Heads of Departments."[492] Congress has by law vested the appointment of Commission ALJs in the Chairman of the Commission.[493] This distinguishes the Commission ALJs from the particular ALJ discussed in *Lucia*, who was selected by other staff members of the SEC.[494] Therefore, we find that our current practice for appointing ALJs is consistent with the Appointments Clause.

199. Respondents contend that only the Commission, acting collectively, can constitute the head of a department for the purposes of the Appointments Clause. In support of that contention, they rely entirely on the Supreme Court's decision in *Free Enter. Fund v. Public Company Accounting Oversight Board*, which involved, as relevant here, the SEC's authority to appoint individuals to a panel within the SEC.[495]

200. The petitioners in *Free Enter. Fund* argued that only the SEC Chairman could constitute the head of a department for the purposes of the Appointments Clause and that, because the inferior officers at issue were appointed by the SEC Commissioners collectively, their appointments were unconstitutional. The Court disagreed. It explained that the "Appointments Clause necessarily contemplates collective appointments" of inferior officers by the multi-member "Courts of Law."[496] After reviewing the SEC's authority as well as the history of appointment procedures by multi-member bodies, the Court "s[aw] no reason why a multimember body may not be the 'Hea[d]' of a 'Departmen[t].'"[497] In reaching that conclusion, however, the Court did *not* hold that the department head of a multi-member body *must* be the multi-member body acting collectively.

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[492] U.S. Const. Art. II, § 2, cl. 2.

[493] 42 U.S.C. § 7171(c).

[494] *See Lucia*, 138 S. Ct. at 2058.

[495] Answer at 150 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 511-12 (2010) (*Free Enter. Fund*)).

[496] *Free Enter. Fund*, 561 U.S. at 513 (citing *Freytag*, 501 U.S. at 918 (Scalia, *J.*, concurring in part and concurring in judgment)).

[497] *Free Enter. Fund*, 561 U.S. at 512 (first alteration added).

201. Indeed, any such conclusion would have been inconsistent with the Court's own precedent. In *Freytag*, the Court upheld the sole appointment authority of the chief judge of the U.S. Tax Court, notwithstanding the Court's conclusion that the nineteen-member Tax Court was one of the "Courts of Law" for the purposes of the Appointments Clause.[498] Thus, *Freytag* stands for the proposition that a single head of a multi-member body may appoint inferior officers where Congress by law vests that single head with the authority to make such appointments. Read together, *Free Enter. Fund* and *Freytag* suggest that, when vesting appointment authority of inferior officers within a multi-member body, Congress may choose whether to vest that authority in a single department head or in the multi-member body collectively. And the Court's recent decision in *Lucia* does not address this issue. Nor does its holding—narrowly confined to concluding that ALJs are "Officers"—conflict with its other rulings on the Appointments Clause. In fact, the Court's analysis in *Lucia* of whether the SEC's ALJs are Officers for purposes of the Appointments Clause expressly followed the analysis in *Freytag* as to whether special trial judges are Officers. Thus, there is nothing in *Lucia* to suggest that the Court was departing in any respect from its holdings in *Freytag*.

202. As set forth above, in enacting the DOE Organization Act, Congress chose to vest the authority to appoint ALJs in the Commission's Chairman. Accordingly, the appointment of the Commission's ALJs is consistent with the Appointments Clause. As such, we do not find the need to set this issue for hearing.

3. Whether the Seventh Amendment Requires this Case to be Brought in Federal District Court

a. Respondents' Position

203. In their Answer, Respondents claim that the Seventh Amendment[499] and Article III[500] of the U.S. Constitution entitle them to a federal district court proceeding, as opposed to an administrative adjudication. Respondents argue that the Seventh Amendment guarantees

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[498] *Freytag*, 501 U.S. at 870-71, 890-92.

[499] The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII.

[500] Article III provides that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" and that "[t]he judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." U.S. Const. art. III, § 1.

the right to a jury trial in actions "brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century,"[501] and because a "civil penalty was a type of remedy at common law that could only be enforced in courts of law," "the Seventh Amendment require[s] a jury trial" in any action that seeks such penalties.[502] Citing Article III, Respondents also argue that this proceeding implicates "[t]he judicial power of the United States" and must be conducted by a judge with life tenure and salary security — protections "incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government."[503]

204. Respondents contend that the "public rights" exception to this regime, which permits Congress to assign the initial adjudication of certain matters to an administrative agency when "the Government sues in its sovereign capacity to enforce public rights created by statut[e]," does not apply.[504] Respondents also point out that Congress expressly provided for district court adjudication of materially identical market manipulation claims under the FPA.[505]

b. OE Staff's Position

205. OE Staff argues that the Commission's penalty proceedings involve public rights that may be decided in the first instance by the agency.[506] OE Staff contends that this is a quintessential "public rights" dispute because it arises "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[507] OE Staff states that this

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[501] Answer at 151 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989); U.S. Const. amend. VII).

[502] *Id.* (citing *Tull v. United States*, 481 U.S. 412, 420, 422-23 (1987)).

[503] *Id.* (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982)).

[504] *Id.* at 152 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977)).

[505] *Id.* (citing 18 C.F.R. § 1c.1; 16 U.S.C. §§ 824v, 823b(d)(3)).

[506] Staff Reply at 95 (citing *Atlas Roofing*, 430 U.S. 442, 450).

[507] *Id.* at 95-96 (citing *Stern v. Marshall*, 564 U.S. 462, 489 (2011) (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)); *accord Austin v. Shalala*, 994 F.2d 1170, 1177 (5th Cir. 1993)).

enforcement action stands in contrast to "matters 'of private right, that is, of the liability of one individual to another under the law as defined.'"[508]

206. OE Staff contends that the civil penalty action "serves a public purpose."[509] OE Staff states that Congress established the Commission's NGA civil penalty authority in NGA section 22, and in so doing explicitly declined to create a private right of action that might arguably involve "the liability of one individual to another."[510] OE Staff states that the Anti-Manipulation Rule implementing NGA section 4A's prohibition on market manipulation likewise explicitly disavows creating a private right of action and thus, the rights at issue in this proceeding are public rights.[511]

207. OE Staff also challenges Respondents' contention that the "fraud-and-deceit rights in the NGA are private, common law rights, not new statutory obligations."[512] OE Staff contends that, under Supreme Court precedent, cases arising under statutes cannot be treated as "private rights" disputes merely because the statutes "fashion causes of action that are closely *analogous* to common-law claims."[513] OE Staff states that an action brought by the Government to enforce federal law "is not converted into a common law tort simply because the theory of liability underlying the enforcement action is analogous to a common law tort theory."[514] Moreover, OE Staff states, the NGA does not

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[508] *Id.* at 96 (citing *Stern*, 564 U.S. at 489 (quoting *Crowell*, 285 U.S. at 51)).

[509] *Id.* (citing *Marine Shale Processors v. EPA*, 81 F.3d 1371, 1376 (5th Cir. 1996)).

[510] *Id.* (citing NGA section 4A ("Nothing in this section shall be construed to create a private right of action.")).

[511] *Id.* at 96-97 (citing 18 C.F.R. § 1c.1(b) (2016) ("Nothing in this section shall be construed to create a private right of action.")).

[512] *Id.* at 97 (citing Answer at 152).

[513] *Id.* (citing *Granfinanciera,* 492 U.S. at 52 (emphasis in original)).

[514] *Id.* (citing *Crude Co.*, 135 F.3d at 1455; *Austin*, 994 F.2d 1170, 1176-78 (agency action to recoup overpayments of benefits was a public rights case notwithstanding the resemblance to a quasi-contract claim); *Akin v. Office of Thrift Supervision*, 950 F.2d 1180, 1186 (5th Cir. 1992) (agency action to enforce the respondent's agreement to comply with regulations was a public rights case notwithstanding alleged similarity to a breach-of-contract action)).

"withdraw[] from judicial cognizance" any pre-existing common law action.[515] OE Staff states that although the Anti-Manipulation Rule prohibits certain fraudulent conduct, the Commission specifically determined in Order No. 670, adopting the Anti-Manipulation Rule, that the conduct covered by the Rule is not "confined [by] the common law definition of fraud,"[516] and that violative conduct need not encompass certain elements (such as reliance, loss causation, and damages) that a litigant must prove in a private action under analogous securities laws. OE Staff states that liability under the NGA is based on an entity's violation of the Anti-Manipulation Rule, not any common law doctrine.[517]

208. OE Staff also argues that Respondents have not identified any common law action that could have been brought in district court before enactment of EPAct 2005 that can no longer be brought because Congress authorized the Commission to enforce the NGA by seeking civil penalties. Far from withdrawing common law matters from the courts, in Order No. 670 the Commission stated its expectation that the parties to wholesale energy transactions will "continue to resolve most contract disputes, including those based on claims of fraud in the inducement, without the involvement of the Commission, relying on state and federal courts to apply contract law as appropriate."[518]

c. Commission's Determination

209. We reject Respondents' claim that the Seventh Amendment and Article III entitle them to a federal district court proceeding. We find that this enforcement proceeding involves public rights that may be decided in the first instance by the Commission.

210. As Respondents point out, "the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal."[519] The Supreme Court

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[515] *Id.* at 98 (*CFTC v. Schor*, 478 U.S. 833, 854 (1986)).

[516] *Id.* (Order No. 670, 114 FERC 61,047).

[517] *Id.* (citing *Houston Oil & Ref. Co. v. FERC*, 95 F.3d 1126, 1136 (Fed. Cir. 1996) (FERC administrative proceeding to enforce regulations does not violate Article III where "liability attaches because the individual acted in violation of the [statute] and its accompanying regulations" and is not "dependent upon establishing the elements of a common law tort")).

[518] *Id.* (citing Order No. 670, 114 FERC ¶ 61,047).

[519] *Granfinanciera,* 492 U.S. at 53.

has held that the Seventh Amendment is not applicable to administrative proceedings.[520] Specifically, the Supreme Court has held "[a]t least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[521] Accordingly, Congress "may decline to provide jury trials" where an action involves "statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity."[522]

211. This case is a classic public rights case. It arises "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[523] This is in contrast to matters "of private right, that is, of the liability of one individual to another under the law as defined."[524] In EPAct 2005, Congress explicitly declined to create a private right of action when it enacted new NGA section 4A. As such, new NGA section 4A bars manipulation in connection with the purchase or sale of natural gas or transportation services and specifically provides that "[n]othing in this section shall be construed to create a private right of action."[525]

212. Respondents argue that the "public rights" exception does not apply to this case, and that the causes of action in the NGA are private, common law rights, not new statutory obligations. However, the Supreme Court has stated that "Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in

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[520] *See Tull*, 481 U.S. 412, 416-17 & n.4 (citing *Atlas Roofing*, 430 U.S. 442, 454; *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974)).

[521] *Atlas Roofing*, 430 U.S. at 450.

[522] *Granfinanciera,* 492 U.S. at 55 & n.10. *See also Crude*, 135 F.3d 1445, 1455 (Fed. Cir. 1998) (Commission adjudication regarding violation of oil price control regulations involved public rights).

[523] *Crowell*, 285 U.S. 22, 50.

[524] *Id*. at 51.

[525] 15 U.S.C. § 717c-1.

which jury trials are unavailable."[526] Moreover, as OE Staff points out, "[a]lthough the Anti-Manipulation Rule prohibits certain fraudulent conduct, the Commission specifically determined that the conduct covered by the Rule is *not* 'confined [by] the common law definition of fraud,' and that violative conduct need *not* encompass certain elements (such as reliance, loss causation, and damages) that a litigant must prove in a private action under analogous securities laws."[527] Liability under the NGA is based on an entity's violation of the Anti-Manipulation Rule, not any common law doctrine.[528]

213. The fact that Congress established different administrative procedures in the NGA and FPA when it enacted EPAct 2005, each of which the Commission is tasked with implementing, suggests Congress acted intentionally and purposefully.[529] Had Congress intended a federal district court review option for NGA market manipulation claims, it presumably could have adopted the structure of the FPA.[530] It did not.

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[526] *Granfinanciera,* 492 U.S. at 52.

[527] Staff Reply at 98 (citing Order No. 670, 114 FERC ¶ 61,047 at n.103).

[528] *See also* Order No. 670, 114 FERC ¶ 61,047 at n.100 (explaining that "[w]hile cases arising in the context of private litigation may be instructive on certain points, the elements needed for a private right of action are not the same as those required for administrative enforcement applicable here.").

[529] *See*, *e.g.*, *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 55 (concluding, in view of the different language concerning penalty assessment procedures contained in the FPA, NGPA and the NGA, each of which the Commission administers, that Congress understood existing law, and, when enacting a new, related law (i.e., new NGA section 22, which was added by section 314 of EPAct 2005) that Congress did so deliberately and consciously). *See also Russello v. United States*, 464 U.S. 16, 23 (1983) (interpreting different sections of the Racketeer Influenced and Corrupt Organizations chapter of the Organized Crime Control Act of 1970, the Court stated that where "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

[530] *See* FPA sections 31(d)(1), (2) and (3), 16 U.S.C. §§ 823b(d)(1), (2) and (3). Under those FPA provisions, an entity against whom penalties may be assessed is given notice by the Commission of its opportunity to elect, in writing, the procedures outlined in subsection (d)(2) (i.e., a hearing before an ALJ followed by an appeal to the appropriate U.S. court of appeals) or (d)(3) (i.e., a penalty assessment by the Commission, by order, followed by a *de novo* review in the appropriate federal district court).

214. We also find that Respondents' reliance on *Tull*[531] is inapposite. The language of the Clean Water Act, the statute in question in *Tull*, expressly provides for district court imposition of civil penalties. Accordingly, *Tull* merely stands for the proposition that when the federal government seeks to impose civil penalties under the Clean Water Act in a judicial forum, rather than in an administrative forum, the defendant is entitled to a jury trial on the issue of liability.[532] *Tull* does not stand for the proposition that the Seventh Amendment prohibits the Commission from seeking the imposition of civil penalties under the NGA in an administrative forum. Accordingly, we deny Respondents' claims based upon the Seventh Amendment and Article III of the Constitution and decline to set this issue for hearing.

4. Whether the Fifth Amendment Requires this Case to be Brought in Federal District Court

a. Respondents' Position

215. Respondents claim that the Fifth Amendment's Due Process Clause precludes the Commission from subjecting Respondents to an administrative adjudication because the Commission's practices and procedures will deny Respondents impartial adjudicators in a tribunal lacking "'the appearance'" or reality "'of justice.'"[533] Respondents argue that this is because, under the Commission's procedures, the Advisory Staff who communicate *ex parte* with OE Staff during the investigation phase are permitted to advise the Commissioners and the ALJs during the adjudicatory phase. Because the Commission does not keep records of *ex parte* communications between OE Staff and Advisory Staff, Respondents contend that they have no assurance that Advisory Staff has not been biased by these *ex parte* communications with OE Staff—or that Advisory Staff will not, in turn, provide biased advice to the Commission's decision-makers in subsequent *ex parte* communications with those adjudicators. Respondents contend that the Commission's proceeding against Respondents has been tainted by these "candid back-and-forth discussions and oral briefings" during the investigation phase—with no opportunity for Respondents to challenge OE Staff's findings.[534]

216. Respondents further complain that the Commission ALJs do not apply the Federal Rules of Civil Procedure and Evidence, but rather the Commission's own evidentiary

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[531] Answer at 151 (citing *Tull*, 481 U.S. at 420, 422-23).

[532] *See Tull*, 481 U.S. at 426-27.

[533] Answer at 153 (citing *In re Murchison*, 349 U.S. 133, 134-35, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))).

[534] *Id*.

rules.[535] Respondents state that these rules give the ALJs free reign to admit hearsay evidence—including evidence derived from OE Staff's *ex parte* depositions of witnesses during the investigation phase—which Respondents may lack any meaningful opportunity to rebut.[536] Respondents state that, despite this low standard for admissibility of prosecution evidence in hearings, the Commission maintains that its ALJs are also free to prevent respondents from gaining access to relevant exculpatory evidence by, for example, permitting OE Staff to claim privilege without producing a privilege log.[537] Respondents contend that, as a result, they may never see all of the exculpatory evidence necessary to defend themselves.

217. Respondents also contend that the Commissioners that have already concluded that OE Staff made out a *prima facie* case of a violation based on extensive and allegedly privileged *ex parte* discussions, then purport to review the ALJ's findings in "appeals" from the ALJ's decision. Respondents state that this fact-finding will be subject only to highly-deferential "substantial evidence" review in the courts of appeal—thus potentially allowing the Commission to compel Respondents to pay hundreds of millions of dollars even if the preponderance of the evidence shows that no violation occurred.[538] Respondents contend that this process will deny Respondents impartial adjudicators in a tribunal lacking "'the appearance'" or reality "'of justice'" and thus violates due process.[539]

b. OE Staff's Position

218. With respect to Respondents' Fifth Amendment Due Process claim, OE Staff argues that, in *Withrow v. Larkin*, the Supreme Court foreclosed challenges like those raised by Respondents, holding that "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of

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[535] Answer at 154 (citing 18 C.F.R. § 385.101 (2016)).

[536] *Id.* (citing 18 C.F.R. § 385.509(a)).

[537] *Id.* at 154-55 (citing *BP Am. Inc.*, Docket No. IN13-15-000, at 7 (July 3, 2014) (delegated letter order)).

[538] *Id.* at 155 (citing *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 385 (D.C. Cir. 2006); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[539] *Id.* (citing *In re Murchison*, 349 U.S. at 134-35 (quoting *Offutt*, 348 U.S. at 14)).

the [agency] members at a later adversary hearing."[540] OE Staff contends that the *Withrow* Court rejected the contention that *In re Murchison* "stand[s] for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications."[541] Instead, the Supreme Court stated that it is "very typical for the members of administrative agencies" to perform all these tasks and, therefore, concluded that "[t]his mode of procedure does not violate the [APA], and it does not violate due process of law."[542] OE Staff argues that claims such as Respondents'–"that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication"–"ha[ve] a much more difficult burden of persuasion to carry" than cases "in which the adjudicator has a pecuniary interest in the outcome [or] in which he has been the target of personal abuse or criticism from the party before him."[543]

219. OE Staff contends that Respondents "must overcome two strong presumptions: (1) the presumption of honesty and integrity of the adjudicators; and (2) the presumption that those making decisions affecting the public are doing so in the public interest."[544] OE Staff contends that Respondents' argument has the same problems identified in *Withrow*, i.e., Respondents have provided "[n]o specific foundation . . . for suspecting that the [Commission has] been prejudiced . . . or would be disabled from hearing and deciding" the relevant claims "on the basis of the evidence to be presented at the contested hearing."[545] OE Staff also contends that Respondents have "not offered any

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[540] Staff Reply at 100-01 (citing *Withrow v. Larkin*, 421 U.S. 35, 47-52, 55 (1975) (*Withrow*)).

[541] *Id.* at 101 (citing *Withrow*, 421 U.S. at 53).

[542] *Id.* (citing *Withrow*, 421 U.S. at 56).

[543] *Id.* (citing *Withrow*, 421 U.S. at 47).

[544] *Id.* at 101-02 (citing *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 512 (5th Cir. 2001) (quoting *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052-53 (5th Cir. 1997)); *Hasie v. Off. of Comptroller of Currency*, 633 F.3d 361, 367-68 (5th Cir. 2011) (similar); *Shows v. Wayne Cty. Sch. Dist.*, 71 F.3d 876, 1995 WL 725765, at *2 (5th Cir., Nov. 8, 1995) (per curiam)).

[545] *Id.* at 102 (citing *Withrow*, 421 U.S. at 55).

proof to overcome the presumption of fairness," which means that their "due process challenge fails."[546]

220. Finally, OE Staff contends that it is well settled that hearsay evidence is not categorically excluded in administrative proceedings.[547] OE Staff states that the principal limitation on hearsay evidence is that the evidence must have the indicia of reliability and probative value[548] and, consistent with those dictates, the Commission's Rules of Practice and Procedure allow ALJs to admit hearsay, but "should exclude from evidence any irrelevant, immaterial, or unduly repetitious material."[549] Therefore, OE Staff argues, the Commission's evidentiary rules are permissible under the Constitution.

c. Commission's Determination

221. Respondents make several due process claims, and we detail the reasons for our denial of each below.

222. Respondents contend that the Commission's procedures violate the Fifth Amendment's Due Process Clause, because they allow not only the OE Staff members who conducted an investigation, but also any Commission advisory staff member who communicated with the investigators before the issuance of the order to show cause instituting adversarial proceedings, to advise the Commission during the proceedings.[550] We disagree. The Constitution contains no such prohibition on advisory staff advising

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[546] *Id.* (citing *Ford Motor*, 264 F.3d at 511-12; *Schweiker v. McClure*, 456 U.S. 188, 196 & n.10 (1982).

[547] *Id.* (citing *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 462 (5th Cir. 2015); *United States v. Int'l Bd. of Teamsters*, 941 F.2d 1292, 1298 (2d Cir. 1991); *Hoska v. U.S. Dep't of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982)).

[548] *Id.* at 102-03 (citing *Young v. U.S. Dep't of Agric.*, 53 F.3d 728, 730 (5th Cir. 1995)).

[549] *Id.* at 103 (citing 18 C.F.R. § 385.509(a) (2016)).

[550] Respondents make a similar contention with respect to advisory staff advising the ALJ conducting the hearing. However, there can be no violation of due process in this instance, because advisory staff does not discuss the merits of a case with the presiding ALJ. *Separation of Functions*, 101 FERC ¶ 61,340, at P 13 (2002) (2002 Policy Statement) ("[T]he Commission's ALJs currently serve as true trial judges, generally not consulting advisory staff, ensuring that the trials are a separate and distinct aspect of the decision making process.").

the Commission. In *Withrow*, the Supreme Court held that claims like that of Respondents – "that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication" – must overcome "a presumption of honesty and integrity in those serving as adjudicators" and prove that "conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[551] Respondents offer no evidence of actual bias or prejudgment by the Commission, except for their assertion that the Commission has not identified any cases in which OE Staff issued a 1b.19 Notice recommending civil penalties and the Commissioners then declined to issue an order to show cause or reached a finding that no violation had occurred in that case. As in *Withrow*, Respondents have provided "[n]o specific foundation … for suspecting that the [Commission has] been prejudiced … or would be disabled from hearing and deciding on the basis of the evidence to be presented at [a] contested hearing."[552]

223. Moreover, the Commission's Rules of Practice and Procedure clearly and appropriately distinguish the roles of investigative staff and decisional staff. In regard to the separation of functions, Rule 2202 of the Commission's Rules of Practice and Procedure provides as follows:

> [I]n any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings,

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[551] *Withrow*, 421 U.S. at 47. *See also Ford Motor*, 264 F.3d at 512 (stating that where decision makers are those that exercise both investigative and adjudicative responsibilities, "[t]he movant must overcome two strong presumptions: (1) the presumption of honesty and integrity of the adjudicators; and (2) the presumption that those making decisions affecting the public are doing so in the public interest.") (quoting *Valley*, 118 F.3d 1047, 1052-53).

[552] *Withrow*, 421 U.S. at 55. *See also Schweiker*, 456 U.S. 188, 196 & n.10 (no due process violation where the district court's "factual findings … relied almost exclusively on generalized assumptions of possible interest" and where the plaintiffs "adduced no evidence to support their assertion that, for reasons of psychology, institutional loyalty, or … coercion, hearing officers would be" biased); *Ford Motor*, 264 F.3d at 511-12 (rejecting Ford's claim that "the mere possibility of impropriety" inherent in a structure where one exercises both investigative and adjudicative responsibilities equates to lack of due process and holding that without evidence of improper influence on decision makers, the due process challenge fails).

> conclusion or decision, except as a witness or counsel in public proceedings.[553]

Consistent with this rule, when the Commission issued its Order to Show Cause in this proceeding on April 28, 2016, the Commission issued a notice designating as non-decisional the staff of the Office of Enforcement, with the exception of 10 named individuals.[554] The notice stated that, "[a]ccordingly, pursuant to 18 C.F.R. § 385.2202 (2015), [the non-decisional staff] will not serve as advisors to the Commission or take part in the Commission's review of any offer of settlement."[555] Consistent with Rule 2201,[556] non-decisional staff are also prohibited from communicating with advisory staff concerning any deliberations in this docket.

224. Prior to the issuance of the Commission's Order to Show Cause, OE Staff who conducted the investigation are not prohibited from speaking with decision makers or their advisors. This is because there are no parties in a Part 1b investigation[557] and the *ex parte* (Rule 2201) and separation of functions (Rule 2202) rules do not apply unless and until the Commission initiates a proceeding governed by Part 385, such as by issuing an order to show cause.[558] The Commission further found that "Rule 2201, which implements section 557(d) of the APA, pertains to the prohibition of off-the-record

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[553] 18 C.F.R. § 385.2202 (2020).

[554] *Total Gas & Power N. Am., Aaron Hall and Therese Tran f/k/a/ Nguyen*, Notice of Designation of Commission Staff as Non-Decisional, Docket No. IN12-17-000 (Apr. 28, 2016). A subsequent notice was issued on January 30, 2017 and another on February 19, 2019.

[555] *Id*.

[556] 18 C.F.R. § 385.2201 (2020).

[557] *Id.* § 1b.11.

[558] In *Shell*, the Commission underscored that "[t]he applicability of Rule 2202 'assumes a trial-type evidentiary hearing.'" *See Shell Energy North America (US), L.P.*, 175 FERC ¶ 61,025, at P 44 (2021); *see also Ex Parte Contacts and Separation of Functions*, 125 FERC ¶ 61,063, at PP 4, 9 (2008); 18 C.F.R. §§ 385.2201-2202; *MidAmerican Energy Holdings Co*., 113 FERC ¶ 61,298 (2005); *Duke Energy Corp. and Cinergy Corp.*, 113 FERC ¶ 61, 297 (2005); *Exelon Corp. and Pub. Serv. Enter. Group Inc.*, 113 FERC ¶ 61, 299 (2005).

communications in contested on the record proceedings and states, in relevant part, that investigations under FPA Part 1b are excluded from applicability."[559]

225. In the 2002 Policy Statement, the Commission explained that the freedom an investigator has to discuss a matter with anyone in the Commission derives from the meaning of "adjudication" in section 5 of the APA,[560] i.e., "agency process for formulation of an order."[561] The Commission explained that "[i]nvestigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication."[562] If OE Staff decides "to recommend to the Commission that an entity be made the subject of a proceeding governed by part 385 of this chapter," OE Staff shall "notify the entity that [OE Staff] intends to make such a recommendation," and such "notice shall provide sufficient information and facts to enable the entity to provide a response."[563] In terms of due process, the Commission stated that "[p]roceeding in this way does not compromise the Commission's decision making process, because the 'mere

[559] *Id.* P 45 (citations omitted).

[560] Section 5 of the APA, which "applies … in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C § 554, "establishes requirements governing certain agency proceedings that come within the [APA's] definition of 'adjudication.'" *Int'l Telephone & Telegraph Corp. v. Local 134 v. Int'l Brotherhood of Elec. Workers*, 419 U.S. 428, 431, 442-43 (1975) (*ITT v. Local 134*).

[561] 2002 Policy Statement, 101 FERC ¶ 61,340 at P 27 (citing 5 U.S.C § 551(7)); *In re Shell Energy North America (US), L.P.*, 175 FERC ¶ 61,025 at P 46 (quoting *Withrow*, 421 U.S. at 55) (The Commission found that an "investigator may speak to decision makers and their advisors throughout her investigation (up to the point where she may be assigned to be a litigator), providing them with details of the investigation, seeking their input on how to proceed, and discussing settlement with them. Proceeding in this way does not compromise the Commission's decision making process, because the 'mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the [[Commissioners] at a later adversary hearing.'").

[562] *Id*. (quoting *ITT v. Local 134*, 419 U.S. 428, 443 (quoting *Attorney General's Manual on the Administrative Procedure Act* at 40 (1947)).

[563] 18 C.F.R. § 1b.19.

exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the [Commissioners] at a later adversary hearing.'"[564]

226. Respondents also contend that the Commission's proceeding against Respondents has been tainted by these "candid back-and-forth discussions and oral briefings" communications—with no opportunity for Respondents to challenge OE Staff's findings. We find this argument meritless. The Commission is provided with the factual and legal arguments made by those who are the subject of an investigation at every significant stage of the investigative process.[565] First, when OE Staff seeks authority from the Commission to engage in settlement discussions with investigative subjects, it provides the Commission with all of the written submissions made by the subject in response to staff's preliminary findings.[566] Second, if there is no settlement and the matter moves forward to a notice under Rule 1b.19, the subject is given another opportunity to make a submission, which is also provided to the Commission.[567] Third, if the Commission decides to issue an order to show cause, the subject is given another opportunity to respond without any page number limits. Finally, in addition to these three separate opportunities, an investigative subject always has the opportunity to share its views with the Commission, in writing, on any aspect of the case and at any time throughout the course of the investigation.[568]

227. We also deny Respondents' claim that the Commission's procedural rules are unconstitutional. Congress did not require the Commission to follow the rules of evidence as applied in the courts. Indeed, section 15(f) of the NGA specifically states that "[a]ll hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct

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[564] 2002 Policy Statement, 101 FERC ¶ 61,340 at P 26 (quoting *Withrow*, 421 U.S. at 55).

[565] *See Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at PP 27, 40.

[566] *Id.* at PP 32, 34.

[567] *Id.* at PP 35-36; *see also* 18 C.F.R. § 1b.19; *Submissions to the Commission upon Staff Intention to Seek an Order to Show Cause*, Order No. 711, 123 FERC ¶ 61,159 (2008).

[568] *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at PP 27, 40. *See also* 18 C.F.R. § 1b.18.

thereof the technical rules of evidence need not be applied."[569] Moreover, courts have held that hearsay evidence is not categorically excluded in administrative proceedings, provided such evidence is otherwise substantial and has probative value.[570] Consistent with these dictates, the Commission's Rules and Regulations allow ALJs to admit hearsay, but "should exclude from evidence any irrelevant, immaterial, or unduly repetitious material" or "any other material which the ALJ determines is not of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs."[571] Should Respondents have concerns regarding the admissibility of any particular evidence, Respondents should raise those concerns with the ALJ.

228. Further, the Commission has added additional due process protections by enacting a policy on disclosing exculpatory materials.[572] Thus, Respondents' concerns that they will be denied access to relevant exculpatory materials are unfounded.

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[569] 15 U.S.C. § 717n(f). *See also FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940) (administrative agencies "'should not be too narrowly constrained by technical rules as to the admissibility of proof,' … should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (quoting *Interstate Com. Comm'n v. Baird*, 194 U.S. 25, 44 (1904)).

[570] *Richardson v. Perales*, 402 U.S. at 402 (upholding introduction in administrative hearing of hearsay medical reports, based on reports' reliability); (*Knapp v. U.S. Dep't of Agric*., 796 F.3d 445 at 462 ("Hearsay is not categorically excluded from formal adjudicatory proceedings."); *EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) ("[A]dministrative agencies may consider hearsay evidence as long as it bears satisfactory indicia of reliability; and hearsay can constitute substantial evidence if it is reliable and trustworthy." (internal punctuation and citation omitted)); *Int'l Bd. of Teamsters*, 941 F.2d at 1298 ("procedural due process does not require rigid adherence to technical evidentiary rules in administrative hearings, as long as the evidence introduced is reliable") (citing *Richardson v. Perales,* 402 U.S. at 402); *Hoska v. U.S. Dep't of the Army*, 677 F.2d at 138 ("Provided it is relevant and material, hearsay is admissible in administrative proceedings generally and in adverse action proceedings in particular.").

[571] 18 C.F.R § 385.509(a).

[572] *Policy Statement on Disclosure of Exculpatory Materials*, 129 FERC ¶ 61,248 (2009).

229. Respondents also raise due process concerns regarding other actions an ALJ could potentially take in the future.[573] These concerns are speculative and therefore, dismissed. Respondents are free to raise these concerns if and when an ALJ actually takes such actions.

5. Whether the Commission Violated Its *Ex Parte* Rules

230. In this section, we address Respondents' contentions that (1) the Commission's *ex parte* rule violates the *ex parte* communication requirements of the APA, and (2) whether in this case, the Commission has violated its own, allegedly flawed, *ex parte* rule.

231. As explained above in paragraph 225, the Commission's Rules of Practice and Procedure clearly and appropriately distinguish the roles of investigative and decisional staff. Consistent with this rule, when the Commission issued its Order to Show Cause in this proceeding on April 28, 2016, the Commission issued a notice designating the entirety of staff of the Office of Enforcement as non-decisional, with the exception of ten specifically identified OE employees. The notice stated that, pursuant to Rule 2202, the non-decisional OE staff would not serve as advisors to the Commission or take part in the Commission's review of any offer of settlement. The notice also stated that Rule 2201[574] prohibited the non-decisional OE staff from communicating with Advisory Staff concerning any deliberations in this docket.

a. Respondents' Position

232. First, Respondents point to the fact that one of the OE Staff attorneys who is serving as advisory (or decisional) staff in this matter is also serving as investigative (or litigation) staff on another market manipulation case brought under the NGA. Respondents allege that, because this attorney has both an advisory role in this case and a litigation role in another case, it is "unthinkable" that that attorney did not violate the Commission's *ex parte* rule.[575] Respondents also assert that assigning this attorney both an advisory role in one NGA case and a litigation role in another is inappropriate, because many of the same legal issues "will certainly be before the Commission in both cases."[576]

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[573] *See* Answer at 154-55 (asserting that ALJs will not apply the Federal Rules of Evidence and may prevent access to exculpatory materials).

[574] 18 C.F.R. § 385.2201.

[575] Answer at 157.

[576] *Id*.

233. Second, Respondents argue that the Commission has violated the APA's *ex parte* rules by not properly walling off the Advisory Staff.[577] Respondents point to certain testimony from the then-Director of the Office of Enforcement, stating that the Advisory Staff is involved in candid discussions with OE Staff over the course of an investigation.[578] Respondents argue that if Commission Advisory Staff collaborate with OE Staff during an investigation, under the APA's *ex parte* communication rules, said staff should be prohibited from "participat[ing] or advis[ing] in the decision, recommended decision, or agency review" of the action.[579]

234. Finally, Respondents point to the fact that several OE Staff attorneys were listed as counsel on Commission briefs in a related declaratory judgment action and as prosecuting counsel in this case, and argue that those assignments violate the Commission's *ex parte* rule.[580] According to Respondents, these attorneys "undoubtedly communicated with the Commissioners and/or their Advisory Staff regarding the declaratory judgment case following the issuance of the Order to Show Cause."[581] Because "[i]t is undeniable that this case and the declaratory judgment proceeding are factually related," according to Respondents, these attorneys should have been prohibited from communicating with the Commission on the declaratory judgment case, and "the facts strongly suggest that they have violated" the Commission's *ex parte* rules.[582]

b. OE Staff's Position

235. OE Staff first argues that the Commission's *ex parte* rule does not violate the APA. Rather, OE Staff alleges, Respondents have misread the APA's *ex parte* requirements. OE Staff explains that

> the APA does not *per se* bar communications within the agency. Section 554(d) 'expressly exempts . . . the agency or a member or members of the body comprising the agency.' This exemption encompasses both the Commissioners themselves as well as other 'employee[s] who must counsel the [Commission] at both the investigative and decision making stages of a

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[577] *Id.* at 158.

[578] *Id.* (citing Parkinson Testimony at 11).

[579] *Id.* (quoting 5 U.S.C. § 554(d)).

[580] *Id.* at 159.

[581] *Id*.

[582] *Id*.

> case'—i.e., those staff members whose 'involvement in all phases of a case is dictated 'by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases.' What the APA actually bars is 'where an individual *actually participates* in a single case as both a prosecutor and an adjudicator.'[583]

236. OE Staff next argues that the Commission's *ex parte* rule has not been violated in this case; rather, as with the APA, Respondents have misread the requirements of the Commission's *ex parte* rule. OE Staff explains that, based on a plain reading of the rule, and contrary to Respondents' position,

> Rule 2202 only prohibits an employee who was "assigned to work upon the proceeding or to assist in the trial thereof" from "participat[ing] or advis[ing the Commission] as to the findings, conclusion or decision, except as a witness or counsel in public proceedings." It does *not* prohibit staff members who did not actually work on the investigation from later advising the Commission if a proceeding is commenced.[584]

237. Finally, OE Staff points out that Respondents have failed to allege or show any specific communication that they contend occurred in this matter in violation of either the APA's or the Commission's *ex parte* rules.[585] Instead, Respondents rely merely on their own insinuations that some staff members must be tainted because of their work on other matters involving NGA violations.[586]

c. Commission Determination

238. We find that the Commission's *ex parte* policy does not violate section 5(d) of the APA as Respondents suggest, nor has the Commission violated the APA or its own *ex parte* rules.

239. We agree with OE staff that it is not a violation of the separation of functions required by the APA for investigators to communicate with non-investigators during the

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[583] Staff Reply at 104-05 (quoting *Withrow*, 421 U.S. at 52; *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980); *Greenberg v. Bd. of Gov. of Fed. Reserve Sys.*, 968 F.2d 164, 167 (2d Cir. 1992)).

[584] *Id.* at 106 (quoting Rule 2202).

[585] *Id.* at 103-09.

[586] *Id.* at 107.

investigation stage when the Commission is considering whether to issue an order to show cause commencing a formal proceeding under Part 385. Nor is it a violation of the APA for the Commission's Advisory Staff to communicate with Commissioners' Staff or OE Staff about what conduct may constitute a violation and whether such conduct may harm FERC-regulated markets. As held by the D.C. Circuit Court of Appeals, "Congress…has accepted a pragmatic view that the need for effective control by the agency head over the commencement of proceedings requires an ability to conduct consultations in candor with an investigative section on the question whether a notice should be issued and a proceeding begun, and this notwithstanding any residual possibilities of unfairness."[587] The communications that Respondents assert violate the APA are precisely the type found to be acceptable under the APA by the D.C. Circuit.

240. Additionally, while the APA states that "an employee … engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to [5 U.S.C § 557] except as a witness or counsel in public proceedings," it also expressly exempts from this prohibition "the agency or a member or members of the body comprising the agency."[588] Contrary to Respondents' claims, this exemption encompasses both the Commissioners themselves and other employees, including Advisory Staff, "who must counsel [the Commission] at both the investigative and decisionmaking stages of a case" and whose "involvement in all phases of a case is dictated 'by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases.'"[589]

241. Likewise, Respondents' argument that an OE Staff employee who is decisional in this matter should be walled off because that employee was involved in the investigation of a prior, separate NGA investigation involving a different entity lacks merit. As the D.C. Circuit Court of Appeals has held, "[u]nder § 5(c) [of the APA,] investigative and prosecuting personnel are precluded only from participating in the adjudication of cases

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[587] *Envt'l Def. Fund v. EPA*, 510 F.2d 1292, 1305 (D.C. Cir 1975).

[588] 5 U.S.C. § 554(d).

[589] *Grolier, Inc.*, 615 F.2d at 1220-21 ("We conclude, therefore, that under 554(d), attorney-advisors are 'precluded only from participating in the adjudication of cases in which they have actually performed such ('investigative and prosecuting') functions, and in 'factually related' cases.'") (quoting *Au Yi Lau v. U.S. Immigration & Naturalization Serv.*, 555 F.2d 1036, 1043 (D.C. Cir. 1977)).

in which they have actually performed such functions, and in 'factually related' cases."[590] The prior investigation of BP that Respondents reference involved a completely separate factual situation from this proceeding. In the BP case, OE Staff alleged that BP made uneconomic sales at the Houston Ship Channel in 2008 as part of a manipulative scheme to suppress the Houston Ship Channel *Gas Daily* index. In this case, OE Staff alleges that Respondents made uneconomic trades at the trading hubs of SoCal, El Paso, Permian Basin, West Texas, Waha, and San Juan from June 2009 to June 2012 as part of a manipulative scheme to affect monthly index prices at those hubs.

242. Respondents assert that the OE employee who was involved in the BP investigation must be walled off in this case because many of the same legal issues will be before the Commission in both cases. However, the similarity of legal issues between the two cases does not render them "factually related cases" for purposes of section 5(c) of the APA. The 1947 *Attorney General's Manual on the Administrative Procedure Act*, prepared by officials of the United States Department of Justice who participated in the drafting of the APA, addresses this very point. It explains:

> The phrase "factually related case" [in section 5(c)] connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded from rendering any assistance to the agency, not only in the decision of the cease and desist proceeding, but also in the decision of the revocation proceeding. *However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted*.[591]

243. Here, the OE employee who litigated the BP case did not participate in the underlying investigation of Respondents either as an investigator or a litigator. That the facts of this proceeding "may form a pattern similar to those" in the BP case does not prevent the OE employee who prosecuted the BP case from assisting the Commission in

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[590] *Au Yi Lau*, 555 F.2d at 1043; *Greenberg*, 968 F.2d at 167.

[591] U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* at 54 n.6 (emphasis added).

the decision in this case. Accordingly, we reject Respondents' claims and find there is no violation of the APA.

244. We also find that the Commission did not violate its own *ex parte* rules. Similar to the APA, the separation of functions requirements of Rule 2202 prohibit an employee who was "assigned to work upon the proceeding or to assist in the trial thereof" from "participat[ing] or advis[ing the Commission] as to the findings, conclusion or decision, except as a witness or counsel in public proceedings."[592] Thus, as OE Staff notes, it does not bar staff members who did not actually work on an investigation from later advising the Commission if a proceeding is commenced.

245. Respondents' claims, similar to those made with respect to the APA, that the Commission violated its *ex parte* rules because it did not wall off Advisory Staff, fail. The fact that, before issuance of the order to show cause, such staff members may have communicated or otherwise assisted OE Staff concerning what types of conduct constitute a violation and whether such conduct is harmful to Commission-regulated markets is not contrary to Rule 2202. As discussed above,[593] advising or communicating is not prohibited and is not the same as actually participating in the investigation, which is what the rule prohibits.

246. Similarly, Rule 2202 does not prohibit an employee that worked on a different investigation of a different entity from participating in this case. Respondents' attempt to impute prohibited communications from the employee's work on the separate case, which Respondents allege involved "many of the same legal issues as this case," do not establish that he actually worked on the investigation in this matter or that he made any improper communications. Moreover, Respondents do not even allege that the subject employee actually participated in the investigation in this matter. There would only be a violation of Rule 2202 if an employee that worked on the investigation in this matter was advising the Commission on the decision in this matter. That is not the case, and as noted, Respondents do not allege that it is.

247. We also reject Respondents' claims that the Commission violated Rule 2202 because non-decisional staff members in this proceeding and managers within OE were listed as counsel on briefs in Respondents' declaratory action lawsuit. First, Respondents again merely contend that such employees "undoubtedly communicated with the Commissioners and/or their Advisory Staff regarding the declaratory judgment case" but provide no actual evidence of any communication. The fact that certain lawyers are named in the signature block of the Commission's brief is not evidence that they "undoubtedly" made impermissible communications. Second, contrary to Respondents'

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[592] 18 C.F.R. § 385.2202.

[593] *See supra* PP 236-37.

assertions here, the declaratory judgment action is not "factually related" to this matter as it did not implicate the facts of this investigation. Indeed, Respondents themselves argued in that case that the facts of this proceeding were not in dispute there and that the issue in that case was "not whether [Respondents] had violated the NGA, but whether the law requires [the Commission] to litigate the alleged violations in a federal district court instead of via an administrative proceeding."[594] For these reasons, we do not find the need to set this issue for hearing.

VI. Issues Set for Hearing

A. The Anti-Manipulation Rule

248. Based on its review of the Staff Report and the pleadings filed in response to the Order to Show Cause by Respondents and OE Staff, the Commission finds that there are genuine issues of fact material to the decision of this proceeding which require a hearing before an ALJ. The ALJ should determine whether Respondents violated NGA section 4A and the Commission's Anti-Manipulation Rule. In so doing, the ALJ should make findings respecting the outstanding elements of a manipulation claim,[595] as described in section 1c.1 of our regulations, namely:

> (i) Conduct: whether Respondents "directly or indirectly, . . . (1) . . . use[d] or employ[ed] any device, scheme, or artifice to defraud; (2) . . . ma[d]e any untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (3). . . engage[d] in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity;" and
>
> (ii) Scienter: whether Respondents acted with actual intent or recklessness.

249. OE Staff requests that we find that certain material facts set forth in section I.C are uncontested, so as to remove those factual issues from the hearing.[596] With the exception of our findings in section III.A.3 that the trades at issue were "in connection with"

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[594] *Total Gas & Power, N. Am., Inc. v. FERC*, No. 7:16-cv-00028 (W.D. Tex. filed Feb. 2, 2016) Plaintiff's Unconsented Motion to Expedite Resolution of Declaratory Judgment Action Through Accelerated Briefing on Summary Judgment, at 3.

[595] Per the discussion *supra* section III.A.3, we have determined in this order that the transactions at issue in this case are in connection with the purchase or sale of natural gas or transportation of natural gas subject to the Commission's jurisdiction. Accordingly, the hearing does not need to address this element of the manipulation claim.

[596] *See* discussion *supra*, section I.C.

jurisdictional transactions, we find it is more appropriate to leave these matters to the presiding ALJ. At the prehearing conference in this case, the presiding ALJ may determine whether any factual issues material to deciding the issues outlined above are uncontested. To this end, the presiding ALJ may discuss with the Parties whether they are willing to stipulate to any material facts so as to narrow the factual issues to be litigated at the hearing.

B. Civil Penalty

250. OE Staff proposes a penalty of $213,600,000 for TGPNA, $1,000,000 for Hall (jointly and severally with TGPNA), and $2,000,000 for Tran (jointly and severally with TGPNA), based on the Commission's Penalty Guidelines.[597] Nothing in this order should be read as the Commission ruling on those proposed penalties and those proposed penalties are not set for hearing. We reserve for our later consideration: (a) whether civil penalties should be imposed for any of Respondents' violations, if such violations should be found, and the determination of the amount of penalties, per NGA section 22(c);[598] (b) whether any other sanctions should be imposed; and (c) whether, and the method by which, Respondents should disgorge any unjust profits, and in what amount.

251. The Commission will make these determinations based on the record developed at the hearing. To assist us in determining these issues, we direct the ALJ to make factual findings on the statutory factors relevant to a civil penalty and to the factors set forth in the Penalty Guidelines regardless of the ultimate determination of the manipulation claim. In particular, the ALJ shall:

> (i) determine the number of violations, if any, committed by Respondents and the number of days on which any such violations occurred;[599]
>
> (ii) make findings regarding loss, the amount of natural gas involved (separately calculating financial and physical natural gas positions), and duration;[600]
>
> (iii) make findings regarding whether Respondents "committed any part of the [alleged] instant violation less than 5 years after a prior Commission adjudication

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[597] Penalty Guidelines, 132 FERC ¶ 61,216.

[598] 15 U.S.C. § 717t-1(c).

[599] *See* 15 U.S.C. § 717t-1.

[600] Penalty Guidelines § 2B1.1. In making these findings, the ALJ shall "make a reasonable estimate of loss." *Id.*, commentary note 2(C).

of any violation or less than 5 years after an adjudication of similar misconduct by any other enforcement agency,"[601]

(iv) determine whether "the commission of the [alleged] instant violation violated a judicial or Commission order or injunction directed at [Respondents] by the Commission or other Federal and state enforcement agencies that adjudicate similar types of matters as the Commission,"[602]

(v) make findings with respect to Respondents' compliance program on each of the factors specified in § 1B2.1 of the Penalty Guidelines; and

(vi) make findings concerning the amount of profits obtained by Respondents for its alleged manipulative trading conduct, entertaining any reasonable method for calculating this amount,[603] and provide both a gross number of profits and a net amount that deducts Respondents' losses from its physical trading.

The Commission orders:

(A) Respondents' motion to dismiss is hereby denied.

(B) Pursuant to the Commission's authority under the Natural Gas Act, particularly sections 14, 15, 21, and 22, and the Commission's rules and regulations, a public hearing is to be held in Docket No. IN12-17-000 to make findings and a determination as to matters relevant to the issues set forth above in sections III and IV of this order.

(C) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304, shall convene a prehearing conference in this proceeding within 45 days after issuance of this order, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, or remotely (by telephone or electronically), as appropriate.

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[601] *Id.* § 1C2.3(c)(2). In its Staff Report and Staff Reply, OE Staff refers to two settlements entered into in proceedings in the federal district court for the Northern District of Illinois and one settlement with the Commission. Staff Report at 73 (citing *CFTC v. BP Products N. Am., Inc.*, No. 1:06-cv-03503 (N.D. Ill. Oct. 25, 2007); *United States v. BP Am. Inc.*, No. 07-cr-683 (N.D. Ill., Oct. 25, 2007); *see also* Staff Reply at 66-69 (citing *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007)).

[602] *See* Penalty Guidelines § 1C2.3(d).

[603] *See Barclays Bank*, 144 FERC ¶ 61,041 at P 149 (concluding in electric manipulation case that disgorgement amount was "reasonable approximation of profits causally connected to the violation. . .").

Such a conference shall be held for the purpose of establishing a procedural schedule. The Presiding Administrative Law Judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(D) Given that the circumstances caused by the COVID-19 pandemic may disrupt, complicate, or otherwise change the ability of participants to engage in normal hearing procedures, the Chief Judge is hereby authorized to set or change the dates for the commencement of the hearing and the issuance of the initial decision as may be appropriate.

By the Commission. Commissioner Chatterjee is concurring with a separate statement attached.
Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Total Gas & Power North America, Inc. Docket No. IN12-17-000
Total, S.A.
Total Gas & Power, Ltd.
Aaron Hall
Theresa Tran f/k/a Nyugen

(Issued July 15, 2021)

CHATTERJEE, Commissioner, *concurring*:

1. I join the majority in establishing a hearing to determine whether Total Gas & Power North America, Inc., Total, S.A., Total Gas & Power, Ltd., Aaron Hall, and Therese Tran f/k/a Nguyen (collectively, Respondents) violated the Natural Gas Act's prohibition on market manipulation and the Commission's Anti-Manipulation Rule, and to ascertain certain facts relevant for any potential civil penalties. I agree with today's order because there are genuine issues of material fact that must be thoroughly and transparently examined before the Commission can act on the merits.

2. However, I write separately to emphasize that this hearing should not be viewed as a vehicle to firm up the case against Respondents; rather, it should be an impartial venue to consider the credibility of the evidence and the validity of the claims. For instance, as Commissioner Danly notes, Respondents' allegations regarding the veracity of witness testimony warrant careful scrutiny.

3. I also highlight that today's order does not make any judgment about whether penalties are warranted or, if they are warranted, what penalty levels are appropriate. The stakes are high in Commission enforcement proceedings, including and especially for individual respondents. Accordingly, any potential penalties should be right-sized, tailored to the circumstances, and wielded with care. I urge the Commission to stay focused on resolving this long-standing matter as fairly and expeditiously as possible.

For these reasons, I respectfully concur.

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Neil Chatterjee
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Total Gas & Power North America, Inc. Docket No. IN12-17-000
Total, S.A.
Total Gas & Power, Ltd.
Aaron Hall
Theresa Tran f/k/a Nyugen

(Issued July 15, 2021)

DANLY, Commissioner, *concurring*:

1. I concur with today's order because I agree that the staff of the Office of Enforcement (OE Staff) has made out a *prima facie* case of manipulation. Having said that, the Respondents[1] have set forth facially plausible arguments to counter OE Staff's claims regarding the alleged fraudulent scheme, and to demonstrate that Respondents lacked the necessary scienter. The Respondents' arguments raise issues of material fact, and my fellow commissioners and I must keep an open mind and give serious consideration to the evidence presented both by OE Staff and the Respondents at the hearing.

2. Moreover, the Respondents have presented evidence that raises grave concerns as to the credibility of OE Staff's witnesses. Witness credibility is, of course, best assessed at hearing by the trier of fact.[2] Given the Respondents' allegations in this case, I expect

[1] Total Gas & Power North America, Inc. (TGPNA), Total, S.A. (Total), Total Gas & Power, Ltd. (TGPL), Aaron Hall (Hall), and Therese Tran f/k/a Nguyen (Tran) (collectively, Respondents).

[2] *See, e.g. Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977) ("Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify . . . . All aspects of the witness's demeanor . . . may convince the observing trial judge that the witness is testifying truthfully or falsely.") (internal quotations omitted); *see also San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 149 FERC ¶ 61,116, at P 49 (2014) ("With regard to the credibility of witnesses, and the amount of weight to be accorded to particular testimony or evidence, we note that as the trier of fact, the Presiding Judge had the opportunity to observe the witnesses' live testimony and demeanor, and was thus in the best position to evaluate the witnesses' credibility.").

the presiding Administrative Law Judge to carefully assess witness credibility at the hearing.

For these reasons, I respectfully concur.

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James P. Danly
Commissioner

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